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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-14 Misc.

ROBERT BURRELL, *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

SERGEANT V. D. SMITH, ETC., *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

GERALD McCLELLAN, ET AL., *Petitioners,*
v.
JAMES E. X. STOKES, *Respondent.*

DR. HAROLD M. BOSLOW AND
DR. DOMINGO C. SORONGON, *Petitioners,*
v.
JOHN WASHINGTON, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioners pray that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit entered in the above cases on April 10, 1975.

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit, as yet unreported, appears in the Appendix at pages 72a-107a. The Opinion of the United States District Court for the District of Maryland in *McCray v. Burrell* and *McCray v. Smith*, 367 F. Supp. 1191 (D. Md. 1973), appears in the Appendix at pages 1a-58a. The Opinion of the United States District Court for the District of Maryland in *Washington v. Boslow*, 375 F. Supp. 1298 (D. Md. 1974), appears in the Appendix at pages 58a-69a. The Opinion of the United States District Court for the District of Maryland in *Stokes v. McClellan* appears in the Appendix at pages 69a-71a.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 10, 1975. See Appendix at page 73a. This Petition for Writ of Certiorari was filed less than ninety days from the date aforesaid and the jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fourth Circuit erred when it held that exhaustion of State administrative remedies was not required in an action brought pursuant to 42 U.S.C. § 1983.

2. Whether the United States Court of Appeals for the Fourth Circuit erred when it reversed the judgments of the District Court in *McCray v. Burrell*, #74-1042 and

McCray v. Smith, 74-1043, based on a finding that Respondent McCray's Eighth and Fourteenth Amendment rights were violated under the circumstances of those cases and remanded for determinations on the merits.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Eighth and Fourteenth Amendments to the Constitution of the United States. The statutory provisions involved are 42 U.S.C. § 1983 and Article 41, Section 204F, Annotated Code of Maryland. The statutes and relevant constitutional provisions appear in the Appendix at pages 108a-113a.

STATEMENT OF THE CASE

The complaints in these cases invoked the jurisdiction of the United States District Court for the District of Maryland pursuant to 28 U.S.C. § 1343(3) and (4), 42 U.S.C. § 1983 and the Constitution of the United States.

Respondent McCray sought relief pursuant to 42 U.S.C. § 1983 for deprivations of liberty without due process of law and for imposition of cruel and unusual punishment arising out of two separate incidents in which he was allegedly placed naked in an isolation cell for 48 hours as a result of allegedly disruptive and emotionally unstable behavior on his part. The United States District Court for the District of Maryland in *McCray v. Burrell*, 367 F. Supp. 1191 (D. Md. 1973), found no constitutional violations on the part of Petitioners Burrell and Smith and further found that they had acted in accordance with standard operating

procedures which were not violative of Respondent's civil rights. The United States District Court further found that Respondent was required to exhaust his State administrative remedies provided in Article 41, Section 204F, Annotated Code of Maryland.

Respondent Stokes filed a pro se complaint pursuant to 42 U.S.C. § 1983 alleging that prison officials had violated his First and Fourteenth Amendment rights by denying him access to political newspapers. The United States District Court, on the Motion of Petitioner McClellan herein, dismissed the case for failure to exhaust State administrative remedies.

Respondent Washington filed a pro se complaint pursuant to 42 U.S.C. § 1983 alleging injuries and violations of his constitutional rights as a result of the failure of a prison doctor to provide him with necessary medical care. The United States District Court summarily dismissed the complaint for failure to exhaust State administrative remedies which the District Court found to provide fair and adequate redress for the Petitioner.

McCray v. Burrell, McCray v. Smith and *Stokes v. McClellan* were consolidated for purposes of appeal and the same were heard before a three-judge panel of the United States Court of Appeals for the Fourth Circuit on June 6, 1974. Following argument, the United States Court of Appeals for the Fourth Circuit, by Order dated June 27, 1974, consolidated *Washington v. Boslow* with the above three cases and the same were heard *en banc* before the United States Court of Appeals for the Fourth Circuit on October 1, 1974.

On April 10, 1975, the United States Court of Appeals for the Fourth Circuit held that exhaustion of State administrative remedies was not required prior to invoking Federal jurisdiction, thus reversing all of the

judgments below and remanded the cases of Respondents Stokes and Washington for determination on the merits and remanded the cases of Respondent McCray for further proceedings in accordance with their finding that Respondent McCray was denied his rights under the Eighth and Fourteenth Amendments to the United States Constitution.

Reasons for Granting the Writ

ARGUMENT I

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED WHEN IT HELD THAT EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES WAS NOT REQUIRED IN AN ACTION BROUGHT PURSUANT TO 42 U.S.C. § 1983.

This case focuses on the growing and ever more pressing problem of prisoners civil rights petitions that has swelled the federal court dockets in recent years. In fiscal year 1966, 218 civil rights complaints were filed by prisoners in the United States Courts nationwide. In contrast, the same figure has grown to 5,236 cases in the fiscal year 1974. During the first half of the fiscal year 1975, 3,019 prisoner petitions were filed nationwide. *Semi-Annual Report of the Director of the Administrative Office of the United States Courts*, (1975), at p. 19. In the District Courts of the Fourth Circuit alone, 604 petitions pursuant to 42 U.S.C. § 1983 have already been filed by prisoners during the first half of fiscal 1975. Ibid., at p. A-11.[1] An increasing number of these cases have and will continue to find their way to this Honorable Court. The number of truly

[1] This figure compares significantly with 69 petitions filed in the First Circuit, 251 petitions in the Second Circuit, 248 petitions in the Third Circuit, 717 petitions in the Fifth Circuit, 633 petitions in the Sixth Circuit, 513 petitions in the Seventh Circuit, 286 petitions in the Eighth Circuit, 563 petitions in the Ninth Circuit, 199 petitions in the Tenth Circuit, and 22 petitions in the District of Columbia.

meritorious petitions among these is notably quite small. As Chief Judge Northrop remarked in his opinion in *McCray v. Burrell*, 367 F. Supp. 1191, 1206 (D. Md. 1973), (App. 27a), ". . . it seems a misallocation of resources to impose the burden of sifting through the mass of these petitions on federal judges, let alone on Supreme Court Justices. Moreover — and this is at least as important — these overburdened judges and Justices, charged with so many other highly important functions, are less likely to give full and careful attention to each petition than officials whose special task it might be to do so." Thus, not only do prisoner civil rights petitions increase the already overburdened case load of federal judges, but their substantial volume is, in fact, counter-productive to the meritorious prisoner suits. Access to the federal courts is only illusory when a prisoner's complaint receives the summary or even long delayed consideration that a federal judge must necessarily give under the circumstances. The better solution would be to require initial resort to State administrative remedies to screen out those claims which are spurious or frivolous, thus providing needed relief for judicial case loads as well as insuring a more effective, prompt, and thorough consideration of individual petitions via an inmate grievance procedure. In addition to limiting those cases to be heard by the federal courts to those of constitutional dimension, a prior administrative hearing will provide the federal courts with a complete record of such proceedings, and thereby facilitate the role of the federal judiciary once jurisdiction is properly invoked.

Maryland now has in operation a viable and effective inmate grievance procedure which provides for a prompt and fair hearing of grievances and complaints. See *State of Maryland v. McCray*, 267 Md. 111, 144

(1972). By Chapter 210, Acts of 1971, effective July 1, 1971, and codified as Article 41, Section 204F, Annotated Code of Maryland, the Inmate Grievance Commission was established as a separate agency within the Department of Public Safety and Correctional Services and began operation on November 30, 1971, following the appointment of an Executive Director.

The Commission consists of five members appointed by the Governor, two of whom are lawyers, two of whom are "persons of knowledge and experience in one or more of the fields under the jurisdiction of the Department of Public Safety and Correctional Services", and one of whom is a member of the public at large. Article 41, Section 204F(a). At present, the members of the Commission include:

> James G. Boss — Chairman — attorney at law;
>
> James V. Bennett — attorney at law — nationally known penologist and retired Director of the Federal Bureau of Prisons;
>
> Maceo M. Williams — a former correctional officer at Patuxent Institution and probation officer for Baltimore City who is now an official of Baltimore's Concentrated Employment Program, an anti-poverty program;
>
> Edgar A. Fulton — a retired insurance salesman who is now an industrial relations consultant to the United States Bureau of Prisons, and a member of the Maryland Advisory Board for Corrections, Parole and Probation;
>
> Ralph S. Falconer — retired from the Maryland Department of Parole and Probation. See *McCray, supra*, 267 F. Supp. at p. 1202, (App. 19a).

Any person confined in a penal institution or a patient at Patuxent Institution who "has any grievance or complaint against any officials or employees of the

Division of Correction or Patuxent Institution . . ." may submit such grievance to the Inmate Grievance Commission. Article 41, Section 204F(d) (hereinafter referred to as §). The Commission is given original administrative jurisdiction over all grievances. Preliminarily, each grievance is screened by the Executive Director and a complaint may be dismissed if it "is determined to be on its face wholly lacking in merit . . ." or where the Commission obviously lacks jurisdiction. § (c). The order of dismissal is forwarded to the complainant and constitutes a final order for purposes of judicial review. If a complaint is not dismissed, withdrawn or informally resolved, the Commission must hold a prompt hearing. § (f). At least three Commissioners must be present for each hearing and decisions are made by a majority of those Commissioners. A voice-writer record is made of all hearings and is transcribed if judicial review is sought. The decision is issued in the form of an order containing findings of fact, conclusions of law and the disposition of the complaint. § (f). A complaint may be dismissed at this point if "wholly lacking in merit". Such order of dismissal is a final order for judicial review.

If a complaint is found to be meritorious, the Commission notifies the Secretary of the Department of Public Safety and Correctional Services who may either (1) affirm the decision or (2) reverse or modify it if he disagrees with the findings and conclusions of the Commission. The Secretary then may order the appropriate official of the institution to accept in whole or in part the recommendations of the Commission or take whatever action he deems appropriate in light of the Commission's findings. § (f)(2). The Secretary's order is final for the purposes of judicial review.

The Commission is empowered to require by subpoena the production of documents by the person or institution under investigation and it may also require the attendance of witnesses and the production of relevant evidence by those witnesses. § (g). An inmate has the right to appear in person, to call witnesses on his behalf subject only to the right of the Commission to limit the number or testimony of the witnesses based on relevance and materiality. Furthermore, the inmate is given the right to cross-examine all witnesses. If an inmate requests counsel, he may be permitted such representation at his own expense and may also utilize the services of an inmate representative or other outside representative. The aforementioned rights of the inmate "shall not be unreasonably withheld or restricted by the Commission." § (h).

Upon entry of a final order, the inmate may initiate judicial review of the Orders of the Commission and the Secretary in the Circuit Court of the County or city where he is incarcerated. § (1). Such review is restricted to the record and limited to a determination of whether there was any deprivation of rights secured by the federal or state constitutions or laws.

As the District Court found, ". . . there is a viable alternative to direct federal judicial intervention in the State correctional process via § 1983." *McCray, supra,* 367 F. Supp. at p. 1204, (App. 24a). Where there exists a complete and self-executing administrative process such as that present in the Inmate Grievance Commission, which can resolve complaints justly and promptly, the interest of both the courts and the inmates would be better served by requiring exhaustion of the administrative remedies.

Not only has Maryland instituted a fair and expedient procedure for handling inmate grievances, but numerous other states as well have established procedural mechanisms for prisoner complaints. The State of North Carolina, for example, has created an inmate grievance procedure substantially similar to that of the State of Maryland.[2] Other programs, while dissimilar to procedure in Maryland, clearly evidence a trend toward resolving prisoner grievances on the state administrative level as an alternative to seeking relief through the federal court system.[3]

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[2] Under Article 11, General Statutes of North Carolina, §§ 148-101-113, North Carolina has established a five-member Inmate Grievance Commission, which conducts hearings on those complaints found to be meritorious. The statute also provides for review of the Commission's decision by the Secretary of Correction and eventually by the state courts. At the hearings, the inmate has the right to be present, cross-examine witnesses, and be represented by an employee of the Department of Correction.

[3] A. The State of Florida has established an inmate grievance procedure under Inmate Treatment Directive No. 31(7-1-74), issued pursuant to Florida Statutes, Chap. 944.09. Grievances are formally submitted to the Assistant Superintendent within thirty days of their occurrence. He then either handles it personally or orders an investigation. Institution officials have thirty days within which to respond to the inmate. If the grievance is not resolved, the inmate may appeal to the Director, who has thirty days to make a response. Records are to be kept of all grievances, responses and appeals.

B. In Georgia, inmate grievance procedures are authorized in the Georgia Code Ann., § 125-1-2-14. The mechanics of the statute are outlined in a memorandum from the Commissioner of Corrections to all state institutions dated December 2, 1974. The grievance is first submitted to the Deputy Warden/Superintendent to review and investigate. He may hold a private conference with the inmate to discuss a solution to the problem. Appeal to the Warden/Superintendent is the next step. Then, if the inmate is still dissatisfied, he may appeal to the Regional Director within

Following an extensive hearing in *McCray v. Burrell*, 367 F. Supp.) *supra*, Chief Judge Northrop found that

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five days. The Regional Director has thirty days to respond and route the grievance back to the Deputy Warden/Superintendent for possible conferences. Finally, the inmate may appeal to the Commissioner and subsequently to the state courts.

C. Virginia's inmate grievance procedure was implemented in September, 1973 (revised November, 1974), by the Department of Correction for its own use. A prisoner first files his grievance with the officer in charge of the institution. After an investigation and hearing, if necessary, the Superintendent has eight days to respond to the inmate. An appeal then lies to the Deputy Director of Corrections who has fifteen days to reach a decision. A hearing or investigation may be conducted if necessary. The decision of the Director is final.

D. In New Mexico, an inmate must submit his grievance to grievance officers who then refer the same to case workers. A case worker has five days to respond and the inmate may appeal to the three-member grievance committee which has ten days within which to act. Finally, appeal lies to the Corrections Commission which must act at its next regularly scheduled meeting, provided the grievance is submitted at least five days prior thereto. Records of findings and actions taken are kept at each level.

E. An inmate in Idaho may seek review of decision of the Adjustment Committee (punitive) or Classification Committee (administrative classification) by the Chief of Habilitation within three days. Next, he may appeal to the Warden, who has five days to respond, and then to the Director of Correction, who has ten days to render a decision. Finally, the inmate may appeal to the Board of Correction which will review the case at its next meeting (about six times yearly). Idaho's program is administrative with no supporting legislation.

F. Missouri's inmate grievance procedure is outlined in a memorandum from the Department of Corrections to all state institutions dated June 28, 1974, Bulletin No. 55. An inmate is given thirty days to file his complaint with the Director of the Division, who will refer it to the Director of Program Services or Support Services, who then has fifteen days to investigate the case and prepare a report. If it is not resolved there, the matter is referred to the Director, who may appoint

the jurisdiction of the Inmate Grievance Commission ". . . mirrors the traditional areas of § 1983 jurisdiction

a panel of three to consider the problem. If an inmate is still dissatisfied, the matter is submitted within three days to the Director. If not referred to a panel at -the outset, the Director has thirty days to render a decision.

G. Louisiana has a purely voluntary grievance procedure not established by statute.

H. Arkansas has recently established a grievance procedure consisting of several administrative review officers and an appellate procedure within the institution.

I. Pursuant to Illinois Revised Statute, Chap. 38, 1003-8-8 the Director of the Illinois Department of Corrections is required to "establish procedures to review grievances of committed persons." Regulation No. 45 of the Administrative Regulations implements the statutory directive. It establishes a system whereby the inmate first files with the personnel in the institution where he is confined. Then the matter is reviewed by the institutional inquiry board, which meets weekly and where the inmate may appear. A written report of its findings must be filed within ten days. These findings are then reviewed by the Chief Administrative Officer of the institution where the grievance arose. That officer has five days to render a decision and an appeal lies to the Assistant Director of the Adult Division of the Department of Correction and to the Director of the Department, who may affirm or refer the matter to the Administrative Review Board. Ultimate findings and recommendations are to be embodied in reports filed with the Director and Assistant Director, subject to their final determination.

J. New Jersey, while without enabling legislation for an inmate grievance procedure, does have an Ombudsman who examines complaints of state prison inmates.

K. Minnesota also has an Ombudsman for corrections and a staff inmate counsel at the state prison. The office of Ombudsman was created by Minnesota Statutes, § 241.41 (1974) Laws of Minnesota, 1973, Chap. 553, § 5. He has the power to investigate complaints, order persons to appear, give testimony and produce documents, and bring actions in the appropriate state court. He may receive complaints about actions of any administrative agency or on his own motion, initiate and investigation such an action. After investigation, he makes recommendations to the agency. His conclusions and suggestions may be published by transmitting them to the office of the Governor.

in prisoner cases." *McCray, supra,* 367 F. Supp. at pp. 1202, 1208 (App. 19a-20a, 30a-32a). The District Court

L. Hawaii has a state Ombudsman who is selected by the legislature. The program operates on a state-wide level.

M. Oregon has a similar program to that of Hawaii except that the Ombudsman is appointed by the Governor.

N. Ohio and South Carolina likewise have statewide Ombudsman programs.

O. Connecticut's Ombudsman is selected by a private, nonprofit agency and functions independently of the agency that he monitors.

P. In Iowa, the Omsbudsman is an investigator for the Citizens Aide and is selected by the legislature. Like Connecticut's Ombudsman, Iowa's version comtemplates that the Ombudsman will function independently of the agency under investigation.

Q. In Wisconsin, inmates may refer their complaints to the Warden who may convene a staff inmate commission to consider the complaints and make recommendations. There is also an Assistant Attorney General who functions as a specially appointed investigator who reviews the complaints.

R. The California Youth Authority inmates and staff members drew up a procedure where the first level hearing consists of presentation of complaints, investigation and resolution. Final review is conducted by a tri-party panel comprised of a member appointed by the complainant, a member appointed by the correctional administration and a chair-person who is a professional volunteer arbitrator recruited by the American Arbitration Association.

S. In four states, inmate unions have sought recognition as bargaining agents (New York, Michigan, Massachusetts and Connecticut). Two states, Massachusetts and Rhode Island, have recognized unions there and negotiate with them.

T. The New Hampshire State Prison in Concord, New Hampshire, has had in effect since May, 1973 an inmate grievance procedure. Annually, the members of the general prison population elect approximately eighteen "shop representatives". They, in turn, appoint five spokesmen who meet with the Warden on a bi-weekly basis and, when necessary, with the Deputy Warden or Chief Custodial Officer. The meeting agenda encompass a full range of topics; of central concern is the presentation, discussion and attempted resolution of inmate grievances.

further found that the Inmate Grievance Commission also had those equity powers exercised by the federal courts and the power to entertain class actions, grant injunctive relief, consider administrative matters and recommend changes in policies. The only power which the Inmate Grievance Commission lacked was the power to award money damages, although it was held to have the power to award restitution of or payment for property improperly taken. *McCray, supra*, 367 F. Supp. at pp. 1208-1209, (App. 30a-35a). The District Court also observed that the ". . . . powers of the Commission can, in most cases, be exercised considerably more quickly to remedy offensive patterns of official conduct that can the powers of the federal courts"; that the practical enforceability of orders is greater when the person passing the order has the power to discipline and fire and that the average time from the filing of a complaint to a decision was not excessive. *McCray, supra*, 367 F. Supp. at p. 1195, 1209, (App. 5a-7a, 33a-35a). In summary, the District Court found that while the Inmate Grievance Commission did not have the power to award money damages, per se, this did not make the Inmate Grievance Commission an ineffective remedy and stated in summary:

> "However, the only thing which the imposition of this exhaustion requirement would do in these cases is to work a *postponement* of the ultimate award of damages in a meritorious § 1983 suit. . . . Of course, upon exhaustion of the State remedy, an inmate, in a proper case, may still call upon the equity power of the federal court if the exercise thereof is needed in a particular case. If, of course, the remedy of damages is needed to make a prisoner whole again in a particular case, that remedy will likewise be available to the prisoner after he has exhausted the state administrative procedure. . . . Unlike the situation with respect to injunctive or other equity-type relief, there is no

> sense of immediacy attendant upon the awarding of money damages to redress particular deprivations of constitutional rights. . . . At any rate, it is clear that whatever postponement of the right to money damages under § 1983 is worked because of the imposition of an exhaustion requirement does not amount to a deprivation of the ultimate right to such relief in theory, nor is it a deprivation in practical effect. This is true because an award of money does not require the immediate attention which ought to be given to demands for equitable relief, which in fact is given under Maryland procedure. The key point is that the ultimate right to damages is preserved during the complainant's pursuit of his state administrative remedies, and is not destroyed by a requirement that he resort to these remedies before bringing his federal action under § 1983.
>
> "Therefore, this Court concludes that before it will exercise jurisdiction over a prisoner § 1983 complaint, the inmate must exhaust the available state administrative remedy provided by the Maryland Inmate Grievance Commission procedure. Even if the complaint seeks only monetary damages, this avenue of relief should be exhausted. The claim for monetary damages is inextricably tied to prison regulations and disciplinary procedures. The Maryland Inmate Grievance Commission provides a forum with built-in judicial review which can more expertly sort out the meritorious from the frivolous." *McCray, supra*, at pp. 1208-1210, (App. 30a-35a).

See also *Hyde v. Fitzberger*, 365 F. Supp. 1021 (D. Md. 1973) and *Washington v. Boslow*, 375 F. Supp. 1298 (D. Md. 1974), (App. 58a et seq.).

In light of its decision, the Fourth Circuit did not rule on the adequacy of the administrative remedy. (App. 84a). However, Circuit Judge Widener in his separate opinion stated:

> "To this date, the Court has not been faced with a fact situation similar to the one at hand, that is to say, with a state statute providing an administrative remedy which, if not entirely adequate, is so nearly so that the deferral of only a small part of the relief sought would not impinge on the rights of the plaintiff in any significant manner." *McCray, supra,* ___ F.2d at p. ___, (App. 106a-107a).

In its opinion, the Fourth Circuit held that under *Monroe v. Pape,* 365 U.S. 167 (1961); *McNesse v. Board of Education,* 373 U.S. 668 (1963); *Damico v. California,* 389 U.S. 416 (1967) (per curiam); *Houghton v. Shafer,* 392 U.S. 639 (1968) (per curiam); *Wilwording v. Swenson,* 404 U.S. 249 (1971) (per curiam); *Carter v. Stanton,* 405 U.S. 669 (1972) (per curiam); *Metcalf v. Swank,* 406 U.S. 914 (1972) (mem. op.); *Steffel v. Thompson,* 415 U.S. 472 (1974); and *Preiser v. Rodriguez,* 411 U.S. 475 (1973), exhaustion of state administrative remedies was not required in a suit filed pursuant to 42 U.S.C. § 1983.

In *Monroe, supra,* this Honorable Court stated that the primary purposes of 42 U.S.C. § 1983 were to override certain state laws; provide a remedy where state law was inadequate and to provide a federal remedy where a state remedy, though adequate in theory, was unavailable in practice. *Monroe, supra,* at pp. 173-174.

This Honorable Court then stated that as the federal remedy was supplementary to any provided by the state, a complainant need not first seek the state remedy. *Monroe, supra,* at p. 183. *Monroe,* however, dealt with state judicial and not administrative remedies. Justice Frankfurter, in his dissent, would not have barred exhaustion of state remedies. *Monroe, supra,* at p. 237.[4]

Although *McNeese, supra,* dealt with an administrative procedure, this Honorable Court clearly held that the remedy was not adequate and the protections too tenuous to require resort to them. *McNeese, supra,* at pp. 675-676. In *Damico, supra,* this Honorable Court relied on *Monroe, supra,* and *McNeese, supra,* without discussing the adequacy of the State administrative remedy. Justice Harlan, in his dissent, took issue with the principle that there could never be resort to an adequate administrative remedy. *Damico, supra,* at p. 419.[5] *Houghton, supra,* also noted the probable futility of having a state prisoner resort to administrative remedies. *Houghton, supra,* at p. 252.

Finally, in *Wilwording, supra,* this Honorable Court, while apparently reaffirming the non-exhaustion doctrine in § 1983 cases, inserted the usual reference to the probable futility of those remedies although the remedies requiring exhaustion in *Wilwording* appear to have been state court remedies. *Wilwording, supra,* at pp. 250-252. See also the separate opinion of Judge Widener in *McCray, supra,* ___ F.2d ___, (App. 104a-

[4] In *Egner v. Texas City Independent School District,* 338 F. Supp. 931 (S.D. Tex. 1972), that Court construed the word "supplementary" not as being "supersessive" or "subsuming" but as being a reiteration of the third statutory purpose of § 1983, that of providing a federal remedy when the state remedy, theoretically available, was in practice illusory. *Egner, supra,* at pp. 934-935.

[5] In *Armsden v. Cataldo,* 315 F. Supp. 129, 131 (D. Mass. 1970), that Court again reiterated that in *Monroe, supra,* and *McNeese, supra,* that the available State remedies could not afford actual relief to the plaintiffs and the factual basis of those cases strongly suggested racial discrimination. *Houghton, supra,* involved an inadequate and illusory remedy and *Damico* restated *Monroe* and *McNeese* without discussion or analysis.

105a). Similar sentiments regarding the apparent exhaustion requirement were voiced in *Kochie v. Norton*, 343 F. Supp. 956 (D. Conn, 1972), where that Court stated that the main holding of *Damico, supra; Houghton, supra;* and *Wilwording, supra,* was that state court remedies need not be exhausted and, further, that "[N]o decision of the Supreme Court squarely holds that the complaint of a state prisoner, which, if well-founded, is capable of prompt and complete redress by an administrative official, can be brought directly into a federal district court under § 1983 without any attempt at exhaustion of administrative remedies." *Kochie, supra,* at pp. 959-960.

While the Fourth Circuit felt that *Preiser v. Rodriguez*, 411 U.S. 475 (1973), is significant for what it did not say rather than for what it did say, the Fourth Circuit stated that this Honorable Court had the opportunity in that case to impose exhaustion and failed to do so. *McCray, supra,* ___ F.2d ___, (App. 79a-80a). While it is true in *Preiser, supra,* that this Honorable Court failed to impose an exhaustion requirement, it is clear that that failure was based on other considerations and this Honorable Court was not presented with an adequate state administrative remedy. Further, the discussion by this Honorable Court in *Preiser* regarding conditions of confinement and federal state comity shows clearly that those conditions are more applicable to civil rights suits than those presented in habeas corpus actions. *Preiser, supra,* 411 U.S. at p. ___, 93 S. Ct. at pp. 1837-1838. See also *McCray, supra,* 367 F. Supp. at p. 1198, (App. 11a-13a).

In *Gibson v. Berryhill*, 411 U.S. 564 (1973), this Honorable Court seemed to indicate that in certain instances, exhaustion of administrative remedies would be required, but found that the administrative remedies

in *Gibson* were so defective and inadequate that they denied Plaintiffs due process of law. Recent cases have left the question of exhaustion of § 1983 actions unresolved. In *Procunier v. Martinez,* ___ U.S. ___, 94 S. Ct. 1800 (1974), Justice Powell stated that the ". . . problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. . . . [C]ourts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform.[9] Judicial recognition of that fact reflects no more than a healthy sense of realism." *Procunier, supra,* 94 S. Ct. at p. 1807. [Footnote by the Court]. In footnote 9 to the Opinion in that case, Justice Powell recognized that the courts were ill equipped to act as front line agencies to resolve prisoner grievances and noted suggestions for instituting internal administrative procedures. *Procunier, supra,* 94 S. Ct. at p. 1807. In *Wolff v. McDonnell,* ___ U.S. ___, 94 S. Ct. 2963 (1974), this Honorable Court, while not discussing the question of exhaustion in § 1983 cases, did formulate a distinction between due process rights afforded those incarcerated and those in free society. *Wolff, supra,* 94 S. Ct. at p. 2977. See also the separate opinion of Judge Widener in *McCray, supra,* ___ F.2d ___, (App. 105a).

Finally, in *Huffman v. Pursue,* ___ U.S. ___, 95 S. Ct. 1200 (1975), this Honorable Court held that in certain circumstances, an individual would be required to exhaust his state appellate remedies before seeking relief in District Court unless he could bring himself within an exception specified in *Younger v. Harris,* 401 U.S. 37 (1971). "The importance of the ruling [Huffman v. Pursue] is that it shows definitely that the all embracing rule of non-exhaustion in all § 1983 cases is no longer the law, for this, and the holding in *Wolfe,* are

direct holdings that, first, prisoners' rights are special cases, and, second, exhaustion may be required in some circumstances although the basis of the suit is under 42 U.S.C. § 1983." *McCray, supra,* ___ F.2d ___, (App. 106a, separate opinion of Judge Widener).

The Fourth Circuit recognized that as each of the cases presented the same question of exceptional importance, they were consolidated and heard *en banc*. *McCray, supra,* ___ F.2d ___, (App. 74a). While recognizing that the District Court in *Washington v. Boslow, supra,* had found the Inmate Grievance Commission Act a fair and adequate remedy, notwithstanding the inability of the Commission to award damages in an appropriate case, the Fourth Circuit held that, under the law, it could not require exhaustion.

> "We keenly appreciate the force of the factors identified by the District Court in *McCray* and *Washington* as supporting a policy determination that exhaustion of available administrative remedies should be required of prisoners of correctional institutions in Maryland as a prerequisite to a suit under § 1983. We recognize the burden which the increasing flood of prisoner complaint litigation places upon the already over-taxed District Courts as well as ourselves. Nevertheless, we are constrained to conclude that the holding that exhaustion is required may be reached only by either legislation conditioning resort to 42 U.S.C. § 1983 upon the exhaustion of available administrative remedies, or by the Supreme Court's re-examination and modification of its controlling adjudications on the subject. Congress has not enacted such legislation. The Supreme Court has not yet begun a re-examination of its previous holdings and we have no basis on which to predict that it will, or, if so, with what result. We think

> that we have no alternative but to hold that exhaustion may not be required." *McCray, supra,* ___ F.2d ___, (App. 75a-76a).

The Fourth Circuit further stated that ". . . it is inappropriate to consider the policy considerations which might dictate a different course of decision. They must be addressed to the Supreme Court, which alone can overrule its prior decisions, or to the Congress, which has authority to amend the statute. Our duty is clear: We must follow the Supreme Court, not attempt to lead it. We must hold that exhaustion is not required." *McCray, supra,* ___ F.2d ___, (App. 83a). Circuit Judge Field, in his separate opinion, felt that he, too, had no alternative but to hold that exhaustion would not be required in a civil rights action. ___ F.2d ___, (App. 97a-98a). In his separate opinion, Judge Widener, while concurring in the result of the majority solely because of part II of *Wilwording v. Swenson, supra,* stated that:

> "There is assuredly no policy reason for the courts not to apply the customary and general law of requiring exhaustion of administrative remedies merely because a case is brought under 42 U.S.C. § 1983. . . . Since no policy reason exists against exhaustion and protecting the liberty interests as shown by the decisions of the Supreme Court, I can find no policy interests which exist against an exhaustion requirement respecting conditions of confinement. If exhaustion is required to test the legality of the fact of confinement, what policy should require non-exhaustion when testing the conditions of confinement?
>
> "It follows that I would affirm other than on account of that part of part II of *Wilwording* which has not been modified." ___ F.2d ___, (App. 106a-107a).

Circuit Judge Russell joined in Judge Widener's separate opinion.

To deny review of the decision below of the United States Court of Appeals for the Fourth Circuit — that exhaustion of state administrative remedies is not a prerequisite to federal intervention under §1983 — would be to undermine the various reform measures that the states have undertaken to date. Furthermore, it would effectively stifle hopes of future programs to ameliorate prisoner grievances through state mechanisms. Clearly, it is more beneficial to the inmate complainant to have his problem resolved at the outset or within a relatively short time thereafter, as most of the aforementioned state grievance procedures contemplate, than to wait long months until the federal courts process his claim. Settlement of the issue presented here by this Honorable Court is, therefore, plainly in the public interest and in the interest of innumerable prisoners incarcerated nationwide.

The distinguishing feature of this case, absent from all prior litigation, was clearly pointed out by Chief Judge Northrop when he stated:

> "As previously pointed out, this Court does not think that anything in the prior trend of decisions prohibits this action, although, in all candor, the cases would not seem to encourage it. But those were different cases dealing with different facts, with administrative remedies almost neolithic compared to the Maryland Inmate Grievance Procedure." *McCray, supra,* 367 F. Supp. at p. 1207, (App. 30a).

II.

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED WHEN IT REVERSED THE JUDGMENTS OF THE DISTRICT COURT IN *McCRAY v. BURRELL*, #74-1042 AND *McCRAY v. SMITH*, #74-1043 BASED ON A FINDING THAT RESPONDENT McCRAY'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED UNDER THE CIRCUMSTANCES OF THOSE CASES AND REMANDED FOR DETERMINATIONS ON THE MERITS.

The Fourth Circuit clearly erred in *McCray v. Burrell,* No. 74-1042, and *McCray v. Smith,* No. 74-1043, when it held that McCray's consitutional rights have been violated *per se* by his confinement in isolated cells for limited periods of time. The Fourth Circuit held in *McCray v. Smith,* No. 74-1043, that while the conditions of confinement *per se* did not amount to a denial of his rights, the failure to notify a psychiatrist/psychologist pursuant to a Maryland Penitentiary administrative directive may have amounted to such a denial. In *McCray v. Burrell,* No. 74-1042, the Fourth Circuit found two constitutional violations, that is, the conditions of confinement in the mental observation cell and the failure to comply with the administrative directive to contact the psychiatrist/psychologist. See *McCray v. Burrell,* ___ F.2d ___, (App. 90a-92a). In its Opinion, the Fourth Circuit acknowledged the extensive findings of fact made by the District Court which resolved questions of credibility and accepted those findings. They also accepted the District Court's findings that respondent's confinement in isolated cells was not intended as punishment but was for mental observation and as a precaution against a real fear that Respondent would harm himself. *McCray, supra,* ___ F.2d ___, (App. 84a, 87a-88a).

On appeal from the finding of a trial court in a non-jury action, the findings of fact of the trial court will not be set aside unless clearly erroneous and due regard will be given to the opportunity of the trial court to judge the credibility of the witnesses. Rule 52, Federal Rules of Civil Procedure; *B's Co., Inc. v. B. P. Barber and Assoc., Inc.*, 391 F.2d 130, 132 (4th Cir. 1968) and *Agee v. Hickman*, 490 F.2d 210 (8th Cir. 1974). Further, the decision and judgment of the trial court will not be disturbed on appeal if it is supported by substantial evidence and if the same is not erroneous as a matter of law. *Hellman v. Colonial Insurance Co.*, 475 F.2d 1061 (9th Cir. 1973), *B's Co., supra*, at p. 138. See also the separate opinion of Judge Widener, ___ F.2d ___, (App. 103a).

While not stating directly that the District Court's application of the facts to the law was clearly erroneous, it is apparent that the decision of the Fourth Circuit on the merits of these two cases rested on its finding that it did not like isolated confinement rather than on a finding that the Eighth Amendment prohibits such isolated confinement. Judge Field, in his separate opinion, in which Judge Russell joined also construed the majority opinion in this manner. Preliminarily, Judge Field noted that the majority bolstered its opinion by seizing ". . . upon an institutional directive which stated that 'an inmate who is displaying mentally disturbed behavior may be placed in an isolation cell for the inmate's own safety, or that of the

inmate population, until the psychologist/psychiatrist is notified * * *' . . . [T]his somewhat novel constitutional pronouncement utterly ignores the finding of the District Judge that the *principal* reason for McCray's isolation was to insulate the other inmates of the South Wing from the potentially dangerous and disruptive consequences of McCray's outrageous and flagrant misconduct, including what the District Judge found was his attempt 'to burn his cell and possibly the entire South Wing. . . .' The fact is, however, he required no such medical attention, and I am unaware of any consitutional principle which requires or justifies the incorporation of such an institutional directive into the Bill of Rights." *McCray, supra*, ___ F.2d ___, (App. 100a-102a).

As Judge Field noted, this was not a case dealing with an arbitrary or pervasive pattern of conduct as in *Landman v. Royster*, 354 F. Supp. 1032 (E.D.Va. 1073); *Landman v. Royster*, 333 F. Supp. 621 (E.D.Va. 1971), or to prolonged confinement in "strip cells" as in *Wright v. McMann*, 387 F.2d 519 (1967); nor was there an attempt at arbitrary punishment as in *Howard v. Smyth*, 365 F.2d 428 (4th Cir. 1966). See *McCray, supra*, ___ F.2d ___, (App. 101a-102a).

Without a finding that the District Court was clearly erroneous, the decision of the United States Court of Appeals for the Fourth Circuit on the merits of these two cases is clear error.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

Milton McCray
v.
Robert Burrell

Milton McCray
v.
Sergeant V. D. Smith[1] *(Badge No. 153)*

Civ. A. Nos. 72-68-N, 72-234-N

United States District Court, D. Maryland

October 16, 1973

[*367 F. Supp. 1191 (D. Md., 1973)*]

Charles F. Morgan, Legal Aid Bureau, Inc., Baltimore, Md., for Plaintiff.

Francis B. Burch, Atty. Gen. of Md., and John P. Stafford, Jr., Gilbert Rosenthal and Donald R. Stutman, Asst. Attys. Gen., for defendants.

NORTHROP, Chief Judge.

I.
MOTION TO DISMISS

The plaintiff in these cases is an inmate of the Maryland Penitentiary. He has filed these cases

[1] Defendant's correct name is Bernard D. Smith.

alleging various deprivations and improprieties in the actions taken against him by the defendants, which he seeks to have this Court adjudicate under 42 U.S.C. § 1983. The captioned cases were consolidated for trial with two other suits, Milton McCray v. John O. Rutherford, Civ. No. 70-1409-N, and Milton McCray v. Warden, Maryland Penitentiary, Civ. No. 72-69-N. The former case was decided in a separate opinion, and the latter was voluntarily dismissed by the plaintiff before the commencement of trial.

In a joint motion the defendants have moved to dismiss the complaint on the grounds that Chapter 210, Laws of Maryland, 1971, established an Inmate Grievance Commission, whose duties are to investigate and correct grievances asserted by individuals incarcerated in penal institutions in the State of Maryland. The defendants contend that this unique procedure, which permits a full hearing and subsequent judicial review, requires the plaintiff to exhaust these available state administrative remedies.

The problems of scheduling necessitated that the Court hear arguments on the motion immediately prior to the commencement of trial. Such problems are inherent to any prisoner action against a penal institution because of the security risks which arise in transporting a prisoner to the Court.

In Chapter 210 of the Laws of Maryland, 1971, the General Assembly took a giant step toward putting its houses of correction in order. Chapter 210 establishes an Inmate Grievance Commission as an arm of the Department of Public Safety and Correctional Services. Although the detailed workings of the Commission and its procedures will be explored at great length *infra*, the purpose of the establishment of the Commission is to afford Maryland prisoners an administrative forum which, after hearing the merits of prisoner complaints and grievances, is empowered to work within the bureaucracy of the correctional system to remedy affronts to the rights which prisoners are constitutionally entitled to enjoy during the period of their

confinement. The creation and implementation of this Commission constitutes the creation of a state administrative remedy to the jurisdiction of which this Court should defer consideration of prisoner petitions brought in this Court under the provisions of 42 U.S.C. § 1983 and its companion statutes. The pertinent authority interpreting § 1983, when itself interpreted in light of a practical and reasonable judicial approach, does not prevent such a conclusion.

No one intimate with the workings of the United States District Court for the District of Maryland need be reminded of the toll which the meteoric rise in the number of prisoner petitions filed in recent years has taken upon the already heavily taxed resources of this Court. Both the Clerk's Office and the chambers of the Judges of this Court are laboring under the weight of a mound of which never seems to decrease, no matter how rapidly the pending cases are adjudicated.

A look at the Annual Report of the Director of the Administrative Office of the United States Courts for the fiscal year ending June 30, 1972 and the Semi-annual Report of the Director for the first half of fiscal 1973, lend statistical evidence to our conviction that there is little hope of relief from the swelling ranks of petitioning prisoners. At the appellate level, nearly 31% of the prisoner appeals filed nationwide were filed in the United States Court of Appeals for the Fourth Circuit in fiscal 1972. This percentage rose to 36.1% during the first half of 1973. More importantly, prisoner cases accounted for 38% of all cases filed with the Fourth Circuit in 1972, and for 45.3% for the first part of 1973.

Of greater moment for our purposes is the number of civil rights petitions filed by prisoners in the United States District Courts. In fiscal 1972, 252 civil rights petitions were filed by federal prisoners (an increase of 1,580% over 1961, and an increase of 17.8% over 1971), and 3,348 were filed by state prisoners (an increase of 1,435.8% over 1961, and an increase of 14.9% over 1971). During the first half of fiscal 1973, 155 civil rights

actions were instituted by federal prisoners, and 1,891 were filed by state prisoners.

Although it cannot be denied that direct federal judicial intervention has, in recent years, served to remedy the worst examples of retrogressive American penology (as in the infamous Tucker Farm of Arkansas, *see* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968)), the time has come to take a careful and critical look at the continued validity of the sweeping interpretation which has caused § 1983 to be read as a mandate to federal courts and forces them to accept all but the most patently ridiculous complaints from state prisoners, no matter how hard or how successfully the state has tried to set its own prison house in order.

An example of how the breadth of the interpretation of § 1983 has led to excessive federal judicial concern over state prisoners is presented by the litigation filed by the plaintiff in this case, Milton McCray. Since January, 1970, Mr. McCray has filed thirty-six suits with this Court, and, as Appendix A indicates, the number of prisoner petitions he files are increasing with the passage of time. The plaintiff's desire to litigate even the most outrageous complaint is illustrated by Milton McCray v. Warden, Maryland Penitentiary, Civil No. 72-69-N. In this case, which the plaintiff voluntarily dismissed at the commencement of this trial, he alleged that Officer Burrell, and other officers of the penitentiary unknown to the plaintiff, entered the plaintiff's cell on December 16, 1971, and broke open his locker. They then took from the locker twenty-three (23) pornographic books, two hundred and seventy-five dollars ($275), and ninety-five (95) packs of cigarettes, and a substantial number of other personal items.

In his complaint, which is attached to this opinion as Appendix B, plaintiff stated that he and Officer Burrell were engaged in what could best be described as a "Rent-a-Dirty-Book" enterprise. Apparently McCray was receiving between fifteen and twenty dollars a week renting these books to the other inmates. He would rent the "literature" to an inmate for two to five

packs of cigarettes a night. He would then sell the cigarettes to other inmates at the discount price of four packs for a dollar.

This operation falls into the classification of the enterprises alluded to by Russell Kirk in his column which appeared in The Sun on Wednesday, June 27, 1973. In that article entitled "Jailhouse Lawyers: Latest Racket Behind Bars," Mr. Kirk discussed the revelations of a new book by Fred T. Wilkinson and Fred DeArmond, "The Realities of Crime and Punishment: A Prison Administrator's Testament." It was pointed out that prison racketeers ". . . use power to mistreat their fellows or to extort money from them." Obviously, this is what McCray was doing in this instance.

While this complaint was eventually dismissed, it was not until a substantial amount of time had been expended by his attorneys, the Maryland Attorney General's Office and this Court. After this case had been consolidated with three other suits filed by the plaintiff, Michael Millemann, then counsel for the plaintiff, and the Assistant Attorney General representing the Warden, filed a Stipulation For Dismissal of this action, dated June 20, 1972. However, in a letter received by the Court from the plaintiff he asserted his desire that this action not be dismissed. As a result the case remained open, and preparations for trial continued. At the trial the plaintiff, through his counsel, Charles F. Morgan, requested that the Court grant him leave to dismiss this suit without prejudice. He stated that he had decided to pursue his available administrative remedy through the Maryland Inmate Grievance Commission, but if he was dissatisfied with the final disposition of the case, that he intended to refile the complaint in this Court.

A potential abuse of the right to bring action in federal court under § 1983 has thus been realized, with two adverse results. First, the caseload of all the judges has increased tremendously, causing a rising backlog of cases. Secondly, and more importantly, the length of time that elapses from the date a prisoner files a

meritorious claim asserting an infringement of his constitutionally protected rights to the date of disposition, has become so great that often neither equitable nor legal relief are effective in protecting his rights. This latter consequence is due in part to the ever-increasing caseload of the courts, and to some extent is a normal reaction to prisoners who have "cried wolf" many times too often. These factors cause the great concern, and a brief analysis of the magnitude of the problem is warranted.

Recently, this Court held an evidentiary hearing in Mitchell v. Boslow, Civil No. 70-675-N (D.C. Md. 1973), which involved a claim that Patuxent Institution violated the plaintiff's constitutional rights when it failed to protect him from an assault by another inmate. In order to insure that Mr. Mitchell was able to adequately present his case, it was necessary for this Court to request that a local attorney donate his time and represent the plaintiff. After plaintiff's counsel had prepared the case it was necessary to hold a conference with him, the Assistant Attorneys General handling the case for the State of Maryland, and the United States Marshal, to set up security precautions for the hearing. This was necessitated by the desire of the plaintiff to call as witnesses at the hearing seven inmates in the Maryland Correctional System who were incarcerated in three different institutions.

The *Mitchell* hearing lasted three days, March 12—March 14, 1973, with the Court finding that the plaintiff's claim was lacking in merit. During the course of the hearing it was shown that three of the five inmates who actually testified were not even confined with the plaintiff at the time of the assault. In addition, the Court noted that the attitude of one of the witnesses was: ". . . belligerent, his demeanor disrespectful. His recitation amounted to a verbal attack upon the Institution as a whole." Mitchell v. Boslow, Civil Action No. 70-675 (D.C. Md., filed March 30, 1973).

It is clear from these events that when the federal courts act as the initial forum for any prisoner who

alleges a deprivation of his constitutional rights, an allegation often totally without merit, a tremendous amount of court time is required to dispose of the action. If the length of time required for each evidentiary hearing is presumed to be the same as in the *Mitchell* case, and many could quite possibly be much longer when plaintiff is not represented by counsel, it would require forty-two days of trial to dispose of the fourteen § 1983 suits that Milton McCray instituted in this Court in the calendar year 1972. If one does not take into account the time required for pretrial motions and conferences, and the time needed to write and issue an opinion, this one prisoner has occupied a judge's time for 20-25% of the fiscal year. One must be cognizant of the fact that a prisoner civil rights action rarely is disposed of by settlement or voluntary dismissal.

In addition, since the court cannot travel to the prison itself to conduct the trials, added expense is incurred transporting the plaintiff, his witnesses and the prison personnel to the courthouse. Once this financial hurdle has been cleared, security dangers created by a large number of prisoners confined in the courthouse at one time must be confronted.

This Court is not implying that all prisoner civil rights suits are without merit, or that penal institutions in this or any other, state are without sin. But it is suggesting that these suits will continue to consume more and more of the federal courts' time, with the result that it will take longer and longer to provide relief for those prisoners who are actually being deprived of their rights. Thus, it is imperative that the scope of § 1983 be examined, and that the viability of alternative state remedies be evaluated to determine if they can provide a speedier redress of prisoner grievances while providing them the protection of due process of the laws.

The statute which is the cornerstone of virtually all prisoner petitions filed in the District Courts was enacted as § 1 of the Civil Rights Act of 1871, 17 Stat.

13. It is now codified as § 1983 of Title 42 of the United States Code and provides:

> Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

For a considerable time after its passage, this statute received the narrowest of constructions. *See, e. g.,* Hemsley v. Myers, 45 F. 283 (C.C.D. Kan. 1891). However, with the growing march of incorporation of Bill of Rights guarantees into the fourteenth amendment and the concomitant growth in litigative vindication of civil rights, especially where state-created or state-sanctioned racial discrimination was at issue, it was inevitable that the language of § 1983 would eventually receive a broad interpretation. Thus, in Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), the Court opened the door to a flood of civil rights litigation by holding that, in essence, § 1983 extended to a plaintiff deprived of his constitutional rights by anyone acting, albeit unlawfully, under color of state law, a federal right to relief fully supplementary to any right of relief available for the same unlawful deprivation in state courts. Said Mr. Justice Douglas for the majority:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. [*Id.* at 183, 81 S. Ct. at 482].

Perhaps the fact that the plaintiff in *Monroe* set forth allegations of the most outrageous police conduct imaginable upon him and his family solely because of his membership in the Negro race, spurred the Court on

to its statement that § 1983 was intended to afford a remedy fully supplementary to any existing (and presumably adequate) remedy of which plaintiff could avail himself in state court. It is pointed out in an extremely well-reasoned Note entitled "Limiting the Section 1983 Action in the Wake of Monroe v. Pape" at 82 Harv. L. Rev. 1486 (1969) that the fact situation in *Monroe,* outrageous to the civilized man as it may be, fell within none of the three "main aims" of § 1983 articulated by Mr. Justice Douglas, these being; (1) overriding certain kinds of state laws; (2) providing a remedy *when state law is inadequate;* and (3) providing a remedy when the state law is adequate in theory *but not in practice. Id.* at 1489.

In the wake of *Monroe* there followed two cases involving racial discrimination. In McNeese v. Board of Education, 373 U.S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963), the Court determined that a federal action could be maintained under §1983 despite the plaintiffs' failure to pursue available state remedy that provided both court and administrative action. The refusal to require the plaintiffs to exhaust the state court remedy was merely a reassertion of *Monroe,* but the administrative aspect of the state remedy was not required because of its inadequacy under the circumstances. Significantly, the Court pointed out that the pertinent administrative official "has no power to order corrective action." *Id.* at 675, 83 S. Ct. at 1437. The only method of enforcement at his disposal was through the state courts. Four years later, in Damico v. California, 389 U.S. 416, 88 S. Ct. 526, 19 L. Ed. 2d 647 (1967), in a brief per curiam opinion, the Court refused to deny the plaintiffs their right to bring action in federal court because they failed to exhaust a state administrative remedy. In basing its opinion on both *Monroe* and *McNeese,* the Court said of the latter, "we held that 'relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy,' *id.,* 373 U.S. at 671, 83 S. Ct. at 1435." (brackets original). The page reference cited a portion of the decision in which the Court rejected the requirement

of exhausting state court remedies. As Judge Newman pointed out in Kochie v. Norton, 343 F. Supp. 956 (D. Conn. 1972):

> Even if the interpolation of the word "administrative" was warranted, it could at most refer to the type of administrative remedy rejected in the latter portion of the *McNeese* opinion — namely, a remedy which is either beyond the power of the administrator or which cannot provide adequate protection to the right allegedly impaired. [*Id.* at 959].

The Court then took the word "administrative" out of brackets in Houghton v. Shafer, 392 U.S. 639, 88 S. Ct. 2119, 20 L. Ed. 2d 1319 (1968). In a brief and unenlightening *per curiam* opinion the Court held that exhaustion of only administrative remedies would not be required of a § 1983 prisoner-plaintiff where the state Attorney General, the officer to whom ultimate administrative appeal was to be taken, had already indicated his prejudgment of the case, thereby making resort to the administrative remedy an exercise in futility. But the *per curiam* opinion then added that in any event under the authority of Monroe v. Pape, resort to these remedies is unnecessary. *Id.* at 640, 88 S. Ct. 2119. Then in Wilwording v. Swenson, 404 U.S. 249, 92 S. Ct. 407, 30 L. Ed. 2d 418 (1971), the Court stated:

> . . . State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs. Houghton v. Shafer, [cite omitted]. There an inmate's challenge to the confiscation of his legal materials without first seeking administrative redress was sustained. Although the probable futility of such administrative appeals was noted, we held that in "any event, resort to these remedies is unnecessary." [citations omitted]. *Id.* at 251-252, 92 S. Ct. at 409.

This summary treatment of the difficult question of administrative exhaustion by the Court in § 1983 suits

led to the writing of eight separate opinions by the United States Court of Appeals for the Second Circuit in Rodriguez v. McGinnis, 456 F.2d 79 (2d Cir. 1972). This case involved a prisoner suit under § 1983 against the prison officials for loss of good behavior time credit.

Under the laws of New York a prisoner serving an indeterminate sentence may elect to participate in a conditional release program by which he can earn up to 10 days per month good behavior time credit toward the reduction of his maximum sentence. Under the program, accrued good behavior credits can be withdrawn at any time, in whole or in part, for bad behavior or violation of institutional rules. Rodriguez had elected to participate in this program but he was charged with possession of contraband material in his cell. As a result, Rodriguez had a substantial amount of credit cancelled, and in addition, he was placed in segregation. He filed suit in the district court pursuant to § 1983, combined with a writ of habeas corpus. The district court ruled that § 1983 was a proper basis for this suit, and that the habeas corpus claim was merely an adjunct to insure full relief if the plaintiff prevailed in the dominant civil rights suit. On appeal the Court of Appeals reversed, stating that this was really a petition for habeas corpus, and as such, the petitioner was required to exhaust available state remedies. On rehearing *en banc* the Court affirmed the district court on the basis of Wilwording v. Swenson, 404 U.S. 249, 92 S. Ct. 407, 30 L. Ed. 2d 418 (1971). Finally, the Supreme Court ruled that the suit was challenging the validity of fact or length of confinement, and that as such habeas corpus was the appropriate remedy. The Court stated that "a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody." Preiser v. Rodriguez, 411 U.S. 475, 93 S. Ct. 1827 at 1841, 36 L. Ed. 2d 439 (1973). While affirming its decisions in *Wilwording* and *Houghton* the Court again failed to discuss the question of exhaustion of available administrative state remedies

under § 1983. However, the Court did discuss the basis for applying the rule of exhaustion in federal habeas corpus actions. The Court, in discussing the rule as rooted in federal-state comity said:

> It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State. Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems. Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances. In New York, for example, state judges sit on a regular basis at all but one of the State's correctional facilities, and thus inmates may present their grievances to a court at the place of their confinement, where the relevant records are available and where potential witnesses are located. The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons. [411 U.S. 475, 93 S. Ct. at 1837-1838. (footnotes omitted)].

However, the Court enphasized that even when exhaustion is required, it is contingent on the adequacy and availability of the prisoner's state remedy.

There is a need to reconsider the applicability of the exhaustion rule with respect to § 1983 actions when there is an available and adequate state administrative remedy. This is evident when one reads the eight separate opinions issued by the *en banc* panel of the Second Circuit in the *Rodriguez* case which reflect a vast disagreement in interpreting the line of cases from *Monroe* to *Wilwording*. In addition to resolving a conflict in interpretation, a reconsideration is necessary to eliminate the contradiction created by the Supreme Court in its analysis of the exhaustion rule in the context of habeas corpus in Preiser v. Rodriguez, *supra*. In that case, the Court justified the application of the exhaustion rule in habeas corpus by invoking the concept of federal-state comity, while ignoring that it should be no less a consideration in prisoner § 1983 actions. To resolve these problems one must examine the "[v]arying views as to the breath of the *Wilwording* holding, the strength of prior precedents, the proper character of the federal balance, and the potential impact upon judicial administration."[2] It is therefore imperative that this Court consider the validity of these factors and determine under what circumstances, if any, a requirement of exhaustion under § 1983 would be permissible.

A. *Varying Views As To The Breadth Of The Wilwording Decision*

In its brief *per curiam* opinion, the Court in *Wilwording* summarily treated the question of administrative

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[2] *See*, "RECENT DEVELOPMENTS, State Inmate's Challenge To Conditions of Prison Confinement Is Cognizable Under 42 U.S.C. § 1983 And Entails No Requirement Of Exhaustion State Remedies." 72 Col. L. Rev. 1078, 1086 (1972).

exhaustion without even mentioning whether or not such a remedy was available to the plaintiff. While it would appear that *Wilwording*, in light of *Damico* and *Houghton*, suggests that resort to state administrative remedies need never be exhausted before litigating § 1983 suits in federal district court, its holding is far more limited. *See* Kochie v. Norton, 343 F. Supp. 956, 959 (D. Conn. 1972). The main holding in this case is that exhaustion is not required when the state remedy is a judicial one, or is an administrative one which cannot provide adequate protection to the right allegedly impaired. Nowhere does the Court discuss the question of requiring a civil rights plaintiff to exhaust viable state administrative remedies before litigating his claim in a federal court.

[1] This has provoked a variety of views as to the interpretation to be given to *Wilwording*. In *Rodriguez*, the majority of the Second Circuit interpreted the decision as a mandate prohibiting the requirements of exhaustion, whether judicial or administrative. The three dissenting judges in that case viewed it as merely suggesting that no exhaustion be required, but that it did not mandate that result in a particular case. Judge Newman in Kochie v. Norton, 343 F. Supp. 956 (D. Conn. 1972), contended that *Wilwording* and its predecessors held that state judicial remedies need not be exhausted, and administrative exhaustion was not a prerequisite to federal action when the remedy was inadequate under the circumstances.

This Court is of the opinion that Judge Newman's reasoning, when viewed in light of the consequences of a "no exhaustion" rule, is compelling.

B. *The Strengths Of Prior Precedents*

This factor has already been discussed at great length in this opinion, and at this juncture it is only necessary to reiterate that at no time has the Supreme Court explicitly discussed the question of administrative exhaustion under § 1983.

C. *The Proper Character Of The Federal Balance*

In his opinion in Bundy v. Cannon, 328 F. Supp. 165, 171 (D. Md. 1971), Judge Thomsen of this bench quoted from the case of McCloskey v. State, 337 F.2d 72, 74 (4th Cir. 1964):

> . . . In the great mass of instances, however, the necessity for effective disciplinary controls is so impelling that judicial review of them is highly impractical and wholly unwarranted. The remedy of the inmate is through administrative review, which ought to be available always. [328 F. Supp. at 171].

This belief that the federal courts should not intervene in the functioning of state prisons except in the rarest occasions is founded on the assumption that there does exist an adequate remedy through administrative review. This is clearly shown when Judge Thomsen went on to say:

> This court notes that by the Act of 1971, ch. 210, approved April 29, 1971, effective July 1, 1971, Maryland has provided what appears to be an excellent system of administrative review of inmate grievances, through an Inmate Grievance Commission, with an ultimate right of review by the State Courts. [328 F. Supp. at 171].

What appeared to be an effective administrative procedure to Judge Thomsen in 1971, has been judged to be just that. In State of Maryland v. McCray, 267 Md. 111, 144, 297 A.2d 265 (1972), the Court of Appeals of Maryland stated:

> We think that the Inmate Grievance Commission Act and the implementing rules adopted by the Commission provide "a simple and workable procedure by which every person in confinement who has, or thinks he has, a grievance or complaint can be heard *promptly, fairly,* and *fully,*" and *obtain a judicial review* with respect to

his constitutional and statutory rights. [267 Md. at 144, 297 A.2d at 282. (Emphasis added)].

It should be pointed out that to require state prisoners to exhaust such an administrative remedy does not hold them to a stricter standard of exhaustion than other civil rights petitioners, as *Wilwording* seems to suggest. In McGaw v. Farrow, 472 F.2d 952 (4th Cir. 1973), the court held that members of the United States Army stationed at Fort Eustis, Virginia were required to exhaust administrative remedies provided by the military service as a prerequisite to relief in the civil courts for violation of their constitutional rights. *Citing*, United States ex rel. Taylor v. Fritz, 446 F.2d 36, 37 (8th Cir. 1971); Gonzales Salcedo v. Lauer, 430 F.2d 1282, 1283 (9th Cir. 1970); Karpinski v. Resor, 419 F.2d 531, 532 (3rd Cir. 1969); United States ex rel. Berry v. Commanding General, 411 F.2d 822, 824 (5th Cir. 1969); Sohm v. Fowler, 124 U.S. App. D.C. 382, 365 F.2d 915, 917 (1966).

In United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) v. State Farm Mutual Automobile Insurance Company et al., 350 F. Supp. 522 (N.D. Ill. 1972), a civil rights action was filed by a union and black and white motorists against the insurance rating board, insurance companies and insurance advisory organizations on the ground that, in establishing zones for new automobile insurance premium rates, defendants separated the bulk of the Negro population of the city in one zone and imposed substantially higher rates in that zone. The court held that the civil rights actions could not be maintained until the plaintiffs had exhausted their available state adminis.rative remedies, which the court found to be an effective administrative remedy. While the *U.A.A. & A.W. of America* case involved a suit filed under § 1983, *McGaw* did not. However, the need to provide a plaintiff with protection against violations of his constitutional rights is no less great when the defendant is the United States Army. Thus, if a defendant is required to exhaust

administrative remedies for an alleged violation of his rights by an agency of the federal government when the only available judicial forum is the federal court system, it would seem inconsistent not to require such exhaustion when the deprivation is under color of state law.

The Court also notes that plaintiffs charging employment discrimination under Title 7 and the Age Discrimination Act are required to exhaust administrative remedies provided by statute. While it can be argued that exhaustion is required in these cases because Congress specifically provided for it, the rationale supporting such a requirement under § 1983 is no less compelling. The Court notes that while exhaustion in habeas corpus actions is also provided by statute, the Supreme Court had required exhaustion prior to Congress enacting this amendment in 1948. *See* Ex parte Royall, 117 U.S. 241, 6 S. Ct. 734, 29 L. Ed. 868 (1886); Urquhart v. Brown, 205 U.S. 179, 27 S. Ct. 459, 51 L. Ed. 760 (1907); Ex parte Hawk, 321 U.S. 114, 64 S. Ct. 448, 88 L. Ed. 572 (1944).

D. *The Potential Impact Upon Judicial Administration*

This Court has already noted the statistics released in the Annual Report of the Director of the Administrative Office of the United States Courts, and the deluge of litigation instituted in this Court by the plaintiff, Milton McCray. When one evaluates the astronomical rise in prisoner civil rights litigation since 1961, and views the abuse of this right of access to the courts, it becomes apparent that not only will there be a detrimental impact upon the judicial system and its administration, but the legitimate complaints of those prisoners whose constitutional rights are in fact being violated may not be litigated for years.

However, if there is available a viable administrative remedy, then the spurious claims will be weeded out, and the district courts will be called upon to hear only those cases that are clearly of constitutional dimension.

In addition, the federal district courts will have the benefit of a complete record of the administrative proceedings before the Inmate Grievance Commission, and the appeals to the state courts. Finally, when an infringement of a prisoner's rights is found, but equitable relief can be more effectively enforced by the State, this Court will be able to remand the case to the State. Under this procedure a much better record will be available to the court, the constitutional issues presented by the complaint will be definitely articulated, and the Court will not be bound to act as an advocate for the plaintiff to determine what constitutional grievances he might have.

[2] The test that is to be used to determine the propriety of requiring administrative exhaustion in a particular case was stated in Armsden v. Cataldo, 315 F. Supp. 129 (D. Mass. 1970). In that case Judge Caffrey said:

> Relevant to a resolution of whether or not exhaustion is required are considerations of the adequacy of the available state remedy, of whether or not it is really a remedy in fact as distinguished from being a remedy in theory, and of the extent of the state's interest in the subject matter of the litigation. [315 F. Supp. at 131].

Thus, the test of determining the adequacy of the available administrative state remedy is three-fold. First, the court must analyze the theoretical due process adequacy of the state remedy, particularly from the standpoint of making sure the remedy does not contain the forbidden indicia of pre-judgment which renders exhaustion inappropriate. Second, the court must look at the remedy in practice, to see that it is being administered in an even-handed and fair manner. Finally, the third relevant consideration is one that all federal courts must bear in mind when they are called upon to interject themselves into matters entrusted by our form of Government to the realm of the States, and that is, of course, the extent of the State's interest in the subject matter of the federal litigation.

Our first inquiry must be answered by looking at the statute which created the Inmate Grievance Commission in order to determine whether the remedy therein provided is adequare in theory to redress the legitimate grievances of the inmates. The Commission is made up of five members, two of whom are lawyers, two of whom are "persons of knowledge and experience in one or more of the fields under the jurisdiction of the Department of Public Safety and Correctional Services," and one of whom is a member from the public-at-large. The current members of the Commission are:

> James G. Boss, Chairman — Attorney-at-law;
>
> James V. Bennett — Attorney-at-law, and a nationally known penologist and retired Director of the Federal Bureau of Prisions;
>
> Maceo M. Williams — A former Patuxent Institution guard and city probation officer who is now an official of Baltimore's Concentrated Employment Program, an anti-poverty program;
>
> Edgar A. Fulton — A retired insurance man who is now an industrial relations consultant to the U. S. Bureau of Prisons, and a member of the Maryland Advisory Board for Corrections, Parole and Probation; and
>
> Ralph S. Falconer — Retired from Maryland Department of Parole & Probation.[3]

It is evident that the Governor has made every effort to appoint to the Commission individuals with knowledge in relevant areas and who are equipped with the perspicacity to make objective judgments, free from any institutional preconceptions of the facts of a particular in-prison incident.

The mechanics of the grievance procedure are set forth in detail in the statute. 41 Md. Code Ann. § 204F

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[3] At the time of the hearing in these cases, June 11 through June 14, 1973, Jeffrey Levitt, an attorney-at-law, was a member of the Commission. He has since resigned, and Mr. Falconer is newly-appointed to fill the vacancy.

(d)-(l) (Supp. 1971). Suffice it to say here that the procedures assure a detached and unbiased resolution of particular cases, culminating in judicial review of the administrative adjudications.

Any person confined in a state prison, or any patient of Patuxent Institution, who "has any grievance or complaint against any officials or employees of the Division of Correction or the Patuxent Institution"[4] may submit the grievance or complaint to the Commission. The Commission is given original administrative jurisdiction unless the particular facility in which the complaining inmate is confined has an internal grievance procedure approved by the Commission, in which case the inmate must first exhaust the institutional procedure before filing with the Commission.

According to the testimony of the present Executive Director of the Commission, Dene L. Lusby, a grievance is first screened by the Executive Director. While the complaint may be dismissed if it "is determined to be on its face wholly lacking in merit," this statutory authorization is not used. Mr. Lusby testified that the Commission did not want to deny an inmate the opportunity for a hearing. However, complaints are dismissed without a hearing when the initial screening process reveals that the Commission lacks jurisdiction, as where an inmate erroneously files for habeas corpus relief with the Commission. In practice, then, the Commission's jurisdiction mirrors the traditional areas of § 1983 jurisdiction in prisoner cases.

When questioned about the initial filings with the Commission, Mr. Lusby stated that as of May 31, 1973, 923 complaints had been received, of which 98 cases (10%) remained opened to be investigated and/or heard if the same were not dismissed, withdrawn or informally resolved. Under the present Commission procedures, an inmate may request to withdraw his com-

[4] Virtually all § 1983 complaints are premised upon some abuse of authority possessed under color of state law; such was the jurisdictional meaning read into § 1983 in Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

plaint, and he will usually be allowed to do so immediately. However, in a few instances, when the nature of the complaint warrants, he is required to withdraw in front of the Commission. Mr. Lusby further stated that he attempts to informally resolve prisoner complaints by contacting the involved institution and requesting that it voluntarily abate the condition upon which the inmate based his grievance. In these instances any resolution would be favorable to the complaining inmate.

The Executive Director's testimony concerning a number of Commission statistics may be summarized as follows:

1. Complaints received from 7/1/71 to 5/31/73	923
2. Administrative dismissal (complaints that are on their face without merit, complaints that are withdrawn by the inmate, complaints over which the Commission lacks jurisdiction and complaints that are informally resolved)	507
3. Hearings held from November 1971 to May 31, 1973	318
4. Disposition	
a. Some or all relief granted	103
b. No relief granted	153
c. Moot, because prisoner released or escaped	10
d. Pending disposition	50
5. Open complaints as of May 31, 1973	98
6. Scheduled for hearing	58
7. Not scheduled for hearing	40

If the complaint is not dismissed, withdrawn or informally resolved, the Commission is directed to hold a hearing on the grievance as promptly as practicable. The Commission meets twice a week, generally on Wednesdays and Fridays, to hear the grievance of any inmate confined to an institution within the Division of Correction, at the institution where the inmate is housed. At least three Commissioners must sit for each hearing, and decisions are made by a majority of those sitting. A Voice-writer record is made of all hearings,

and is transcribed when the inmate seeks judicial review. This procedure was adopted on December 1, 1972. The Commission's decision is issued in the form of an order, setting forth findings of fact, the Commission's conclusions, and the disposition of the complaint. The disposition may take either of two forms. If the complaint is found after a hearing to be "wholly lacking in merit" it may be dismissed, and such dismissal shall constitute the final order of the Commission for purposes of judicial review. On the other hand, if the complaint is found to be meritorious, in whole or in part, the Commission will so notify the Secretary of Public Safety and Correctional Services. The Secretary may then take either of two actions. He may reverse or modify the order, if he disagrees with the Commission. If he agrees with the Commission's order, as received or as modified, the Secretary shall order the appropriate official of the institution against whom the grievance was filed to accept the Commission's recommendations. Further, the Secretary is empowered by the statute to "take whatever action he deems appropriate in light of the Commission's findings." It is intended that the Secretary will use this grant of power to discipline or otherwise correct officers under his command who have been found guilty by the Commission of engaging in conduct giving rise to a legitimate complaint by the inmate affected. The Secretary's order carrying out the recommendations of the Commission shall constitute a final order for the purpose of judicial review.[5]

The Act gives the Commission the power to require by subpoena the production of any documents by the person or institution under investigation. Further, the Commission may, by subpoena, require the attendance of any person as a witness and the production by that person of any relevant documentary evidence. On cross-examination, Mr. Boss, the Chairman of the Commis-

[5] It was asserted at the hearing that on two occasions the Secretary reversed the Commission's recommendation. These reversals were appealed, and in both cases the Commission's recommendation was reinstated.

sion, testified that no witness has ever refused to appear before the Commission and that there had never been, to the best of his knowledge, any requests for a subpoena. While, the testimony of Robert Coulter, the first Executive Director of the Commission, contradicted this assertion of Mr. Boss, and in general tried to discredit the Commission, several factors mitigated the effect of his testimony. First, the period that he was serving the Commission as its Executive Director can best be described as the Commission's formative period. It was involved in implementing the directives of the enabling statute, and it is understandable that problems would exist at this time. Secondly, while his testimony conflicted frequently with that of Mr. Lusby and Mr. Boss, it is significant that neither Mr. Boss nor Mr. Lusby were associated with the Commission at the same time as Mr. Coulter. Therefore it is understandable that Coulter's experience with the Commission's procedures might be entirely different from that of the present Chairman and Executive Director.

The Act also spells out the procedural requirements of the Commission's hearings. In addition to the fact that the hearings of the Commission are to be recorded and transcribed as required, the Act makes several specific provisions to insure that the tests of procedural due process are met by the Commission's hearings. The inmate-complainant has the right to appear in person before the Commission, and, unlike a trip to court for the inmate, this appearance will not impose any special security problems insofar as the Commission is empowered to hold its hearings at any correctional facility, including the Patuxent Institution. The inmate-complainant is given the right to call witnesses in support of his position, subject to the discretion of the Commission as to the number of witnesses called and the relevance of their testimony. Only witnesses whose testimony would be merely cumulative are excluded. This determination is based on the complaining inmates' assertions as to the subject matter of their testimony. It is further provided that the inmate-complainant is to be given a reasonable opportunity to

question (cross-examine) *any* witnesses who testify before the Commission. These rights of the inmate to the attendance, examination and cross-examination of witnesses "shall not be unreasonably withheld or restricted by the Commission."

The witnesses are not sworn because the Commission has decided that inmates appear to be more relaxed testifying when they are not concerned, or threatened, with the consequences of perjurious testimony. Finally, the inmate is allowed to be represented by an attorney of his own choosing at his own expense, by a law student, or by another inmate. Mr. Lusby testified that an inmate has counsel about 5-10% of the time, and that they are represented either by counsel or a law student approximately 30% of the time. Of course, there is no need for the appointment of counsel, at the expense of the State, for the purpose of representing the inmate, as the hearing is solely remedial, not disciplinary or punitive, in nature.

Upon the entry of a final order in his case, the inmate-complainant may initiate judicial review of the orders of the Commission and the Secretary in the circuit court of the county or city in which he is incarcerated. The judicial review is a review on the record and is limited to a determination of whether there was a violation of any right of the inmate protected by federal or state laws or constitutional requirements. Although Ch. 210 is silent on the point, it appears from a reading of the Maryland Rules of Procedure and the Administrative Procedure Act (see Md. Code Ann., art. 41, § 256) that an appeal can be taken from the action of the reviewing circuit court to the Court of Appeals of Maryland.

[3] It appears to this Court that there is a viable alternative to direct federal judicial intervention in the State correctional process via § 1983. When the enlightened procedures prescribed as a result of Bundy v. Cannon, *supra*, for the imposition of in-prison punishment are combined with the more than adequate remedial route furnished by the Inmate Grievance

Procedure Act, there emerges a picture of a state correctional system which is truly cybernetic. Indeed, the state judicial system has become increasingly involved in remedying the complaints of Maryland inmates, as witness the unprecedented action of the two-judge Circuit Court which conducted an extensive inquiry into the conditions at the Patuxent Institution, McCray v. State, Misc. Pet. 4363 (Cir. Ct. Mont. Co., November 11, 1971), *reversed in part*, State v. McCray, 267 Md 111, 297 A.2d 265 (1972). In that case the Court of Appeals of Maryland noted:

> We take judicial notice that the Commission is now fully operative. It began operation upon the appointment of an Executive Director on 30 November 1971. Rules and Regulations implementing Code, Art. 41, § 204F were adopted. Public Safety and Correctional Services, 12.07.00.00.-12.-07.00.05. The first hearing session was held on 17 December 1971 and hearings have been held continually since that time. Almost 600 complaints have been received from inmates and about 100 orders issued. The complaints and the disposition of them are open to public inspection pursuant to Code, Art. 41, § 204F(i). [267 Md. at 144 n. 27, 297 A.2d at 283].

Further evidence of the Inmate Grievance Commission's viability was reported in *The Sun* on December 8, 1972. *The Sun* reported: "An order banning the use of an extremely painful restraining device known as the 'iron claw' in Maryland prisons has been announced by the State Inmate Grievance Commission." This order was the result of a complaint filed by two prisoners at the Maryland Correctional Institution in Hagerstown that the iron claw was used on them in violation of the eighth amendment of the Constitution.

The State's interest in the subject matter of the prisoner complaints under § 1983 is paramount. The extent of this interest was clearly defined by the Supreme Court, Preiser v. Rodriguez, *supra*, in the

passage already cited in this opinion. Thus is presented the picture of a complete, self-contained and self-executing administrative process set up by the State to resolve prisoner complaints justly and expeditiously. Clearly, the federal courts have neither the time nor resource, nor experience enough, to justify their interjecting themselves into the job of running state penal institutions.

The question of federal court interjection into this area has been the object of considerable study during the last year. One such study is the Report Of The Study Group On The Caseload Of The Supreme Court, 57 F.R.D. 573 (1972). In that Report the problem of prisoner petitions is discussed and analyzed as follows:

> (d) *A court of criminal appeals. The problem of prisoners' petitions.* The dangers of polarization and politicization would be particularly intense in an appellate court whose only concern was the review of criminal convictions. Moreover, there is an inherent dilemma in such a plan, turning on whether or not there would be further review on certiorari in the Supreme Court. If such review were provided, the screening function of the Supreme Court would not be materially relieved. If review were not provided, defendants in criminal cases would be placed in an inferior and invidious position with respect to access to the Supreme Court. We reject a proposal that would put this class of litigants in that position.
>
> But the problem of prisoner petitions, which the Supreme Court shares with lower federal courts and to some extent with State courts, has grown ever more pressing in the last decade or so, and does demand special attention. We refer both to collateral attacks on criminal convictions and to complaints concerning conditions in prisons.
>
> On the Supreme Court's docket at the October Term, 1971, the number of petitions in habeas corpus and other collateral attack cases was 758. Total State and federal prisoner cases filed in the lower federal courts in 1971 came to 16,266.

> Most of the cases are brought by State rather than federal prisoners, although filed in federal courts, and most are habeas corpus petitions. But a substantial number of prisoner cases—3,129 filed in the federal courts in 1971—are civil rights complaints concerning conditions in prisons, and these will increasingly filter up to the Supreme Court. The continuing rise in the volume of prisoners' petitions, on the docket of the Supreme Court as also on the dockets of all federal courts, is reflected in figures collected by the Solicitor General. There is close identity between these petitions and filings *in forma pauperis*. The Solicitor General reports that the number of papers filed by his office in the Supreme Court of the 1971 Term in ifp cases increased by 35.1% over the previous Term. The comparable increase in paid cases was 17.3%. (Memorandum To The Solicitor General's Staff, July 6, 1972.)
>
> The number of these petitions found to have merit is very small, both proportionately and absolutely. But it is of the greatest importance to society as well as to the individual that each meritorious petition be identified and dealt with. And yet it seems a misallocation of resources to impose the burden of sifting through the mass of these petitions on federal judges, let alone on Supreme Court Justices. Moreover — and this is at least as important — these overburdened judges and Justices, charged with so many other highly important functions, are less likely to give full and careful attention to each petition than officials whose special task it might be made to do so. The problem is somewhat analogous to one faced by the medical profession. Mass screening of thousands of people will uncover cancer in very few, but it will diagnose it in some at a stage where prospects of cure are good. The mass screening enterprise is, therefore, justified. But the screening is not conducted by highly trained surgeons. To use surgeons for this purpose would be to misuse them. Nor, unless they are relieved of their other, more

demanding functions, will surgeons likely perform this routine task with the care it routinely requires, if undertaking it at all is to be justified.

As the Solicitor General has remarked (Memorandum To The Staff, *supra*), "[i]t seems obvious that there should be a better way to deal with these questions [presented by ifp prisoner petitions], at least with respect to collateral review." It is satisfying to believe that the most untutored and poorest prisoner can have his complaints or petitions considered by a federal judge, and ultimately by the Supreme Court of the United States. But we are, in truth, fostering an illusion. What the prisoner really has access to is the necessarily fleeting attention of a judge or law clerk. The question is, would it not be better to substitute for the edifying symbol, and the illusion that it presents, the reality of actual, initial consideration by a non-judicial federal institution charged exclusively with the task of investigating and assessing prisoner complaints of the denial of federal constitutional rights. This institution, headed by an official of high rank, would have a staff of lawyers and investigators, and a measure of subpoena and visitatorial powers. It would be charged to investigate complaints, make a response to them, and where possible, try to settle in-prison grievances by mediation.

All petitions for collateral review or for redress of grievances concerning prison conditions, from State or federal prisoners, which could now be filed in a federal court, would go initially to this new institution at the election of the prisoner or by referral to it at the discretion of the court in which a petition is filed. Three months might be allowed the new service for dealing with a complaint or petition lodged orginally with it. At the end of this period the prisoner could file his papers with an appropriate court, but the papers would be accompanied by a report from the new institution.

Thereafter, the matter would proceed as it would now.

Obviously, the details of this proposal remain to be worked out; we believe it merits prompt further study and consideration. [57 F.R.D. at 586-588].

Another suggestion concerning the problem of prisoners' petitions appeared in an article entitled "Prison Ombudsmen Provide a Safety Valve," 56 Judicature 314, March 1973. The article discussed the institution of an ombudsmen system in the prisons to provide effective relief from maladministration. The author then went on to say:

> In an era where the courts have become overburdened, emphasis should be placed on finding alternative or complementary means of achieving just results without unduly increasing the courts' caseloads. An office of ombudsman could serve this function. As primarily a complaint investigation mechanism, the office could readily eliminate duplication of effort by providing independent offices of state legislatures, the courts, and even the correctional administrators with information which would not otherwise be available to them. By improving communication and faciliting investigation, the ombudsman would be able to complement the sophisticated information systems which presently exist in government.
>
> The true value of the ombudsman lies not as a substitute for existing complaint handling mechanisms but as an added protection which attempts to enhance the total grievance machinery by eliminating the present system's weaknesses. It would serve to stimulate present procedures within the correctional system itself, and by so doing would lessen the number of grievance complaints that are now gravitating to the courts. By reducing the number of frivolous complaints and complaints which are not well-suited for judicial determination, the courts would be provided more time to

> devote to adjudicating issues which are of greater importance. An avenue of redress such as this might indeed cause the courts to become more receptive to the complaints which eventually reach them. [56 Judicature at 315].

It appears to this Court that the Maryland Inmate Grievance Commission combines the best of both suggestions, that is, initial investigation by a non-judicial institution charged with the responsibility of investigating and assessing prisoner complaints, and provision for subsequent review by the courts. In addition, the federal-state balance is preserved in the manner expressed by the Supreme Court in Preiser v. Rodriguez, *supra*.

In light of these developments, the least the federal court can do is to give the State system a chance to continue to purge itself of its abuses, which can only be done if the inmate complaints are channeled via the inmate grievance route. It must be emphasized that the imposition of the exhaustion requirement outlined in this opinion does not take away the right of the aggrieved inmate to resort to a federal remedy. All it does is to put the remedy one step beyond immediate reach. If the inmate does not receive justice from the State procedures, he can then file his complaint in the District Court under § 1983. As previously pointed out, this Court does not think that anything in the prior trend of decisions prohibits this action, although, in all candor, the cases would not seem to encourage it. But those were different cases dealing with different facts, with administrative remedies almost neolithic compared to the Maryland Inmate Grievance Procedure. In fact, even if *Wilwording* is interpreted broadly, the United States Court of Appeals for the Fourth Circuit, in Hayes v. Secretary of Department of Public Safety, 455 F.2d 798 (1972), indicated:

> While Maryland has recently established an Inmate Grievance Commission . . . to determine and recommend the proper redress for meritorious grievances of inmates of Patuxent and other

> correctional institutions, we take judicial notice of the fact that the Commission is not yet fully operative. When it is, there will be time enough for the Supreme Court to determine if Monroe v. Pape, and we, our own decisions, should be reexamined. . . . [455 F.2d at 800].

This Court believes, as does the Court of Appeals of Maryland, that the Commission is now fully operative, and takes judicial notice of that fact. Therefore, the time for reexamination is now.

In prisoner rights cases, as in any other § 1983 cases, the federal courts are called upon to exercise both aspects of their jurisdiction, in equity and law. Insofar as the Maryland statute creating the Inmate Grievance Commission does not give the Commission, (or the reviewing courts, for that matter) the power to award money damages for the deprivation of constitutional rights which may not amount to a tort under the laws of Maryland, a serious question as to the propriety of our action might arise if we made the Maryland administrative procedure the sole and *exclusive* remedy for prisoners seeking redress for deprivation of constitutional rights, thus forever barring them from access to the federal damages remedy inherent in § 1983. However, the only thing which the imposition of this exhaustion requirement would do in these cases is to work a *postponement* of the ultimate award of damages in a meritorious § 1983 suit. Although it may be true that very few § 1983 cases ultimately result in the awarding of damages, it is equally true that a federal court cannot close its doors forever to a claim for damages in § 1983 cases, even if an otherwise wholly adequate state remedy exists.

It is clear that the enabling legislation gives the Commission, and seems to give the reviewing courts, only powers comparable to the equity powers exercised by the federal courts, in that the Commission and the Secretary can order the officers and institutions of the correctional system to stop practices offensive to constitutionally safeguarded rights. The fact that

directives have been issued by the correctional system was testified to by Mr. Lusby, and the Warden of the Maryland Penitentiary, Gerald H. McClellan. The plaintiff introduced evidence that one of these directives, which requires two guards to be present when a prisoner's cell is being inspected for various reasons, has not been followed. The Warden, however, pointed out that this was due to a tremendous shortage of prison guards. Under such circumstances, it would make little difference if the directive had been issued by a federal court under the threat of contempt, or by the Secretary of the Commission.

Of the two types of relief available under § 1983, *viz.*, injunctive relief and monetary damages, the type that demands the more immediate adjudication is obviously injunctive relief. Mr. Lusby testified that the Commission had on several occasions issued orders that, in essence, granted the complaining inmate injunctive relief. In I.G.C. No. 1521, In the matter of: Joseph Wallace # 107093, Maryland Penitentiary, an interim order was issued on December 4, 1972. In this order the Commission recommended that Mr. Wallace be taken to the University of Maryland Hospital for an orthopedic examination. As a result, the inmate was taken to the hospital for examination on December 15, 1972.

In I.G.C. No. 1383, In the matter of: James Brady et al., Patuxent Institution, a grievance was filed to contest the suspension of "lawn visits" by the Institution. It had been the practice at Patuxent to permit such visits on Sundays during the warm weather months, weather permitting. During one of the visits one of the patients attempted to escape, and because the other patients did not try to deter the escapee, the Institution suspended all lawn visits for twelve weeks. As a result of this complaint the Commission issued an interim order in the nature of an injunction staying the suspension of the "lawn visits" until an adequate hearing was held.

Mr. Lusby also stated that the Commission had assumed that it had the power to grant "class relief." While the plaintiff pointed out several grievances requesting class relief which had not been granted, it is significant that they were dismissed as being without merit. In I.G.C. Nos. 1295 and 1282, the Commission made recommendations that were approved by the Secretary for the proper administration of the protective custody tier at the Maryland Penitentiary.

It is clear that not only does the State Inmate Grievance Commission have power comparable to the United States District Courts in such cases, but it is certain that the powers of the Commission can, in most cases, be exercised considerably more quickly to remedy offensive patterns of official conduct than can the powers of the federal courts. This is due, of course, to the crowded dockets of the courts in which, of necessity, prisoner cases often receive the lowest priority. Also, the fact that the Commission functions in close conjunction with the Secretary of Public Safety and Correctional Services gives its orders a degree of practical enforceability which those of the court often lack, insofar as judicial decrees are dependent for their enforceability upon respect for the judicial process and fear of incarceration for contempt. Obviously, very few state officers are ever imprisoned for contempt of a federal court order, and one may wonder how willingly they comply with the terms of such an order. However, where, as here, the authority enforcing an order to cease-and-desist from a certain practice is the authority with the power to fire or otherwise discipline an officer who balks at compliance, it would seem that corrective orders would be more enforceable as a practical matter than may be similar orders of a federal court. An added factor weighing in favor of the superiority of the state administrative procedure in the area of equity-type relief, is the fact that the Commission, through the Secretary, has power to discipline, or even fire, persons who are guilty of abusing prisoners. Obviously, no

federal court has like power for not even the most fervent federalist would support the notion that a federal court can take administrative sanctions against particular state officers.

[4] Thus, it is clear that the Maryland Inmate Grievance Procedure offers not only an effective, but a swift, alternative to the exercise of federal equity power under § 1983. Of course, upon exhaustion of the state remedy, an inmate, in a proper case, may still call upon the equity power of the federal court if the exercise thereof is needed in a particular case. If, of course, the remedy of damages is needed to make a prisoner whole again in a particular case, that remedy will likewise be available to the prisoner after he has exhausted the state administrative procedure. United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) v. State Farm Insurance Company, 350 F. Supp. 522 (N.D. Ill. 1972). Unlike the situation with respect to injunctive or other equity-type relief, there is no sense of immediacy attendant upon the awarding of money damages to redress particular deprivations of constitutional rights. The money damages are only given in such cases where the rights infringed upon are admittedly incapable of any sort of rational valuation, because it oftens seems the only way to compensate a person for the wrong that he has suffered. Indeed, our whole common law scheme of awarding damages in civil cases turns upon the assumption that the money paid by the malefactor to the injured party is the cure-all for legal wrongs. We are not so sure that this is the case in the prisoner rights area, insofar as the equity-type relief which the Maryland Commission can give, as outlined above, seems not only more readily available, but also more meaningful. At any rate, it is clear that whatever postponement of the right to money damages under § 1983 is worked because of the imposition of an exhaustion requirement does not amount to a deprivation of the ultimate right to such relief in theory nor is it a deprivation in practical effect. This is true because an award of money does not require the immediate attention which ought to be given to

demands for equitable relief, which in fact is given under Maryland procedure. The key point is that the ultimate right to damages is preserved during the complainant's pursuit of his state administrative remedies, and is not destroyed by a requirement that he resort to these remedies before bringing his federal action under § 1983.

[5] Therefore, this Court concludes that before it will exercise jurisdiction over a prisoner § 1983 complaint, the inmate must exhaust the available state administrative remedy provided by the Maryland Inmate Grievance Commission procedure. Even if the complaint seeks only monetary damages, this avenue of relief should be exhausted. The claim for monetary damages is inextricably tied to prison regulations and disciplinary procedures. The Maryland Inmate Grievance Commission provides a forum with built-in judicial review which can more expertly sort out the meritorious from the frivolous.

Such a disposition by initial action in the federal courts is not attainable except by tortuous process, as demonstrated by these cases as well as the vast majority of other § 1983 prisoner petitions. Nor does it frustrate the original intendment of § 1983, for having taken this route the complaining prisoner can come to this Court with the issue of liability clearly defined on the record. Thus, the federal court can readily dispose of the litigation in the same manner in which it now handles habeas corpus petitions.

These two McCray cases, in accordance with the foregoing opinion, should be dismissed. But to further highlight the tedious process in which a federal court must engage, these cases will be disposed of on the merits as well.

II.

MERITS

[6] The complaints in both of these actions invoke jurisdiction of the Court pursuant to 28 U.S.C. § 1343(3)

and (4), 42 U.S.C. § 1983, and the Constitution of the United States of America. Plaintiff alleges in both cases that the acts of the defendants unconstitutionally deprived him of his right to be free from physical abuse and cruel and unusual punishment as guaranteed by the eighth and fourteenth amendments to the Constitution. He further contends that in both cases this abuse and punishment was arbitrarily imposed in violation of the due process clause of the fourteenth amendment. He also charges that Captain Burrell acted to deny him proper medical care following injuries allegedly received in a fire in his cell.

The testimony in both of these cases, as in most prisoner complaints of this type, is in conflict. While a general picture of the circumstances did develop, the question of liability hinges on the credibility of the witnesses. The Court as the trier of the facts must consider not only the evidence introduced, but also must evaluate the demeanor of the witnesses to determine their credibility. The contradictory statements of the plaintiff during the trial of these cases considerably diminished his credibility. One obviously platant false assertion occurred after he had informed the Court that he had lost count of how many cases he had pending before the various judicial forums in the State. In response to a question posed by the Court, Mr. McCray stated that he never files complaints in more than one court based on the same cause of action. After the conclusion of the trial, it came to the Court's attention that the plaintiff had filed a suit in the Superior Court of Baltimore City alleging the same constitutional deprivations as are involved in Civil No. 72-68-N (Milton McCray v. Captain Burrell). While the defendant in 72-68-N is Captain Burrell, and the suit filed in the Superior Court is against the Warden of the Maryland Penitentiary, 72-68-N was amended at the time of trial by the plaintiff eliminating the Warden and the Penitentiary Medical Staff as defendants. Clearly this indicates, contrary to the plaintiff's contention at trial, that he does attempt to litigate the same causes of action simultaneously before more than

one forum. A copy of the original complaint filed in 72-68-N, and a copy of the complaint filed in the Superior Court are included as appendices to this opinion.

The factual situations in both cases center on disruptive incidents involving the plaintiff, and a determination by the defendants that he be placed in an isolated cell without clothes or a mattress. In Milton McCray v. Sgt. V. D. Smith, (Sgt Bernard D. Smith) Civil No 72-234-N, the plaintiff alleged that on November 20, 1971, while he was confined on the Maryland Penitentiary's South Wing (a wing used to house inmates who have violated prison regulations), Sgt. Smith removed him from his cell, and placed him in the isolated confinement area (I.C., known to the inmates as the "hole") for approximately two days.

The plaintiff was on the South Wing between November 17 and November 20, 1971. Prior to November 20th, Sgt. Smith had never met McCray. Plaintiff admitted that on November 20, 1971 he was placed in a cell on the "street side" of the South Wing, but that he asked to be moved to another cell when he discovered that the cell was in an unsanitary condition (he alleged that there were lice in the cell). Sgt. Smith then came to McCray's cell and took him to the "flats" (the lowest tier on the South Wing). Plaintiff was then given a shower and was deloused and Sgt. Smith was told by the Warden of the Penitentiary to provide the plaintiff with his law books and legal materials while he was on the South Wing. However, these orders were not complied with because, according to the unrefuted testimony of the defendant, the process of packing and moving personal belongings could take from two to three days to complete. The Court notes at this juncture that there was testimony during the course of these trials that the Penitentiary has been forced to operate with a substantial shortage of prison personnel.

After the plaintiff had been placed in a cell on the fourth tier, "yard-side," of the South Wing, he began "hollering and yelling," demanding his legal materials and his medicated shower. Apparently this disturbance,

which was quite substantial according to testimony of both the plaintiff and the defendant, prompted Sgt. Smith to remove McCray from the South Wing and place him in the isolated cell area. Clearly this measure was taken to avoid the possibility of causing a greater disturbance among the other inmates.

While the defendant was transferring the plaintiff from his cell on the South Wing to the I.C. area, McCray began shouting insults and threatening to do bodily harm to himself. Interpreting these threats as an indication of mental and emotional instability, and having personal knowledge of prior incidents involving inmates in isolation who had committed suicide, Sgt. Smith decided to strip McCray and remove the mattress from the cell. He testified that he felt it was better to subject the plaintiff to some discomfort than to risk that he might attempt to kill himself.

The cell in which McCray was placed, I.C. #5, was about 4-5 feet wide, 12-16 feet long and 12 feet high. It had four concrete walls, a concrete ceiling and a concrete floor. At the front of the cell was a solid, metal door and a barred, grill-type door, either or both of which could be closed. There was a toilet and a sink in the cell, and on the floor was a concrete slab about 9 feet long, 3 feet wide and 12 inches high. Normally a mattress is placed on this slab and serves as the inmate's bed.

It was shown during the trial that the recommended procedure, when a prison official places an inmate in the I.C. area, requires that he notify his immediate superior. It is significant that no evidence, other than the absence of any reference to McCray in the log book during this period, was introduced to indicate that the defendant had not complied with this directive. Sgt. Smith testified that they try to log all occurrences, but if there is considerable activity among the inmates, often the guards are unable to make these entries.

The next day when Sgt. Smith checked the plaintiff he discovered that McCray had defecated in a cup, and smeared this waste throughout the cell. Smith then

notified the psychologist, Mr. Musk, and decided to retain McCray for an additional day. While it appears that Mr. Musk may not have examined the plaintiff before he was removed from the I.C. area, it is possible that this may have been due to the fact that November 21st was a Sunday. Mr. Musk testified that he did not recall talking to McCray about this specific incident, nor did he have a record of such a meeting. However, it was brought out during his testimony that he had spoken to the plaintiff on at least ten occasions, and he had made a record of only four of these visits.

Plaintiff also alleged that he was not given any showers during the two days that he was confined in I.C., but the records introduced at the trial clearly indicated that he was given a shower on November 20, 1971.

The incident that is the basis for McCray's suit against Captain Burrell occurred on January 1, 1972. The plaintiff had been placed in Cell #325 on the South Wing on December 31, 1971 sometime between 6:00 and 7:00 p.m. The defendant was a correctional officer and a duty captain whose responsibility was the operation and administration of the entire Penitentiary on the 8 a.m. to 4 p.m. shift.

Plaintiff had been placed in cell #325 by Officer Fazzio, and it appears that the cell had not been cleaned since the departure of the last occupant. There was paper, dirty blankets, a metal locker and other trash lying on the floor. The plaintiff requested that the cell be cleaned up, but was informed that it was too late in the evening. McCray then swept the trash in front of his cell door to be pushed out into the tier the following day.

At approximately 9 a.m. on January 1st he borrowed a cigarette and a light from the inmate in the adjacent cell, even though he testified that he usually does not smoke. The plaintiff alleged that he dozed off with the lit cigarette in his hand, and when he awoke the cell was filled with smoke. He testified that he did not set the fire intentionally, but he was charged with

purposely causing the fire. Plaintiff stated that he jumped from bed and attempted to stamp out the fire, and when this failed he tried to smother the blaze with the mattress, but this merely worsened the situation.

He then took a bucket that was in the cell and tried to carry water from the sink to douse the fire. The bucket, however, would not properly fit under the sink to allow plaintiff to fill it sufficiently for it to be useful. He then used the metal cabinet which was lying on the floor of the cell to first break the sink and then the toilet in alleged efforts to allow the water to flow more freely. When these attempts failed he covered his head and body with water.

The guards, in the meantime, had attempted to put out the fire but the fire extinguisher did not work properly. After a short period of time, they procured a second extinguisher and managed to put out the fire.

The plaintiff testified that he had suffered burns to his hands and face, but the testimony of the nurse on duty at the time of the fire, Mrs. Weber, and the dispensary records, revealed that there were no blisters or serious burns evident. She stated that when the plaintiff was brought into the infirmary he was arrogant and initially refused to allow Officer Martin to apply cold compresses to the areas that he complained had been burned. However, the officer was finally able to apply the compresses and bacitracin ointment to his burns. His eyes were irrigated and his ears were washed out. Mrs. Weber, according to the testimony of the plaintiff, then recommended that he be placed in a locked cell. Captain Burrell ordered that he be placed in the Mental Observation area (M.O.). Captain Burrell testified that he issued this order because he had been informed that the plaintiff had intentionally set the fire, and, since this was not a rational act, he believed that the inmate was mentally unstable. Captain Burrell made a reasonable determination from the circumstances at the time. Having done this he decided, for the safety of the other inmates and the plaintiff, to place McCray in M.O. without clothes or a mattress. He

testified that whenever he had reason to believe that an inmate might try to injure himself he removed from the cell any items that could be used for this purpose.

The plaintiff was allowed to remain in the M.O. area for approximately forty-eight hours, from January 1-3, 1972. It does not appear that he was visited by a medical doctor, nurse, or a psychologist during this interval. It is important to note that shortly after the plaintiff was treated in the dispensary, Nurse Weber contacted Dr. Holljes and advised him that the patient had been placed in M.O. She also attempted to contact a Dr. Stewart but was unable to reach him. The records introduced indicated that the plaintiff was next seen by a physician, a Dr. Wood, on January 4, 1972.

On January 13th the plaintiff was examined by Dr. Gould, who testified that at this time he noticed several crusted sores on McCray's cheeks, ears, a small amount on his back (which the plaintiff did not remember until questioned on cross-examination), and some sores on his knuckles. Dr. Gould further testified that the application of cold compresses and an antibiotic ointment, similar to the type applied to the plaintiff by Officer Martin, was the appropriate treatment to be employed. While he stated that this treatment should have been continued for a period of time, he could not say that it was inadequate.

Although no testimony was given to explain why a psychologist did not examine the plaintiff during his confinement in the M.O. area, it is evident to this Court that the New Year's holiday weekend was a contributing factor. Captain Burrell mentioned during his testimony that the Penitentiary was shorthanded at this time, a factor he considered when he decided to place the plaintiff in the M.O. area.

The plaintiff contends that the procedures employed by both defendants were disciplinary in nature, and that they violated his right to due process of the law. He asserts that the requirements of due process were not satisfied when the defendants failed: (1) to give him adequate notice of the charges; (2) a hearing before a

relatively objective tribunal, and (3) an opportunity to respond to or explain the alleged offenses.

It is true, as the plaintiff points out, that when a prisoner is subjected to substantial deprivations, they should be premised on a rational determination of facts. *See* Sostre v. McGinnis, 442 F.2d 178, 198 (2d Cir. 1971), cert. den. 404 U.S. 1049, 92 S. Ct. 719, 30 L. Ed. 2d 740 (1972). However, this Court disagrees with the allegations that the defendants transferred the plaintiff to an isolated area for disciplinary reasons. Rather, the testimony was quite clear in both cases that McCray had caused substantial disturbances, and he had been removed to avoid the possibility of continued disruptions that might involve substantial portions of the South Wing. It is important to bear in mind that the Maryland Correctional System, like many others, has been plagued by considerable prisoner unrest. While this Court is not absolving the prisons of all responsibility for this problem, it is clear that a prison correctional officer must be concerned with avoiding situations which could ignite a riot. This was the principal factor considered by the defendants in placing the plaintiff in an isolated cell.

In both cases, once the decision to isolate the plaintiff was made, the defendants were faced with a dilemma. Sgt. Smith had to determine if the plaintiff's outburst was merely a way of venting his fustrations, or whether he was in such a frame of mind that he would actually attempt to harm himself. Captain Burrell's task was certainly no easier. Once he concluded that McCray may have set his cell on fire intentionally, a conclusion undoubtedly buttressed by the guards' reports and the fact that the plaintiff did not ordinarily smoke, the defendant Burrell had to determine if the plaintiff would continue to act in a dangerous and disruptive manner. Since the deliberate setting of a fire was not only dangerous to the other prisoners, but to the plaintiff as well, he had to be sure that McCray could not attempt to injure himself in some other way.

To require a prison official to refrain from isolating an inmate until a due process hearing can be held to

determine if the prisoner might attempt to harm himself, and still subject the official to liability for not controlling the actions of that particular inmate, is totally unreasonable. Such a standard of conduct would lead to the resignation of many competent guards, and would deter others from pursuing this occupation as a career. The net result would be an everincreasing manpower shortage in our correctional systems, a problem that is already a major problem.

Captain Burrell and Sgt. Smith both stated that it was standard operating procedure, when confronted with an inmate exhibiting an irrational state of mind, to strip him of his clothes and remove the mattresses. While this procedure obviously caused the plaintiff considerable discomfort, it was certainly reasonable for the defendants to opt for this alternative rather than to risk the chance that the plaintiff might use these items to harm himself. Neither Sgt. Smith nor Captain Burrell had any other choice but to place McCray in an isolated cell for the security of the Penitentiary, and it was necessary to remove all of his clothes and the mattresses from the cell for his own safety.

While, ideally, it may be preferable to remove a prisoner placed in isolation for nondisciplinary reasons after a few hours, in these two cases such a course of action did not appear to be feasible at the times involved. When Sgt. Smith ordered the plaintiff removed from his cell on the South Wing, McCray reacted violently. After a night in the isolated confinement area, Sgt. Smith discovered that he had defecated and smeared his waste about the cell. Under an Administratvie directive issued on August 10, 1970 by the Deputy Commissioner of the Department of Correctional Services, James Jordan, in the absence of a psychologist/psychiatrist, an inmate may be placed in an isolation cell for his own safety, or that of the inmate population, when he displays mentally disturbed behavior. Such behavior was clearly present in the instant case. The directive further provides that a psychologist/psychiatrist be immediately notified after the confinement, and the inmate should be evaluated

within a twenty-four hour period. While Sgt. Smith may not have followed this directive to the letter, he did notify the psychologist the following morning, Sunday, November 21, 1971, when he discovered that the plaintiff had smeared defecation about his cell. He then ordered the cell cleaned and scrubbed, and after another day of observation he had McCray returned to the third tier of the South Wing.

In the case involving Captain Burrell, the plaintiff was confined in isolation in the Mental Observation area for forty-eight hours. This incident not only occurred during the New Year's Day holiday period, a time when a substantial portion of the prison staff was on leave, but had endangered the lives of every inmate confined on the South Wing. Thus, the most pressing matter facing the defendant was the protection of the other inmates. Confronted with a skeleton crew of guards, his only alternative was to separate the plaintiff from the rest of the inmates until his staff returned to its normal strength on Monday, January 3rd. It also appears that the decision to deprive the plaintiff of his clothes and a mattress during the entire forty eight hour period may have stemmed from the unavailability of a psychologist who could examine and evaluate McCray's condition.

None of these events constituted an arbitrary and capricious punishment of the plaintiff. In neither case was he removed from the South Wing as a disciplinary measure, but rather as a security precaution. The plaintiff's clothing and mattress were removed in both cases when he was placed in an isolation cell, in a reasonable attempt to prevent him from injuring himself. The length of time that he remained in isolated confinement was not unreasonable under the circumstances in either case. The fact that the plaintiff was not examined by a psychologist on either occasion was not a result of neglect by the defendants, but appears to have been caused by the unavailability of such personnel during the weekends in question. The Court thus concludes that Sgt. Smith and Captain Burrell did

not arbitrarily impose a punishment upon the plaintiff in violation of his right to due process, but rather they were attempting to take reasonable precautionary measures to insure the safety of the plaintiff and the other inmates of the Penitentiary.

The plaintiff further contends that the condition of the cells and the lengths of time that he was confined constituted cruel and unusual punishment in violation of the eighth amendment. While the conditions of the cells were by no means luxurious, and his confinement undoubtedly unpleasant, this Court does not find that it constituted cruel and unusual punishment. When testifying on his own behalf against Sgt. Smith, the plaintiff admitted that when he discovered the condition of the first cell in which he was placed on the South Wing he "really started to perform." He also testified that he had, in fact, "hollered" long and loud when he did not immediately receive his legal materials. Once Sgt. Smith ordered the plaintiff removed from his cell and placed in the I.C. area, it appears that the plaintiff indicated he intended to do bodily harm to himself. Since Sgt. Smith had met McCray for the first time that same day, it was reasonable under the circumstances that he remove all items from the cell that could be used by plaintiff to carry out his stated intention.

Captain Burrell ordered the plaintiff confined in the Mental Observation area without clothing and without a mattress for similar reasons. The defendant testified that the intentional setting of a fire in one's cell was clearly an irrational act, and it is standard operating procedure at the Penitentiary to place an inmate in an isolated cell without clothes or a mattress when he exhibits an unstable state of mind.

The confinement of the plaintiff in both cases for forty-eight hours was not an unreasonable period when one considers the surrounding circumstances in each case. Sgt. Smith returned the next morning to find that the plaintiff had smeared defecation in his cell. This demonstrated a somewhat less than stable condition, and an additional twenty-four hours in isolation

without clothes appears to have been warranted. Captain Burrell was faced with an inmate who had attempted to burn his cell, and possibly the entire South Wing. The Penitentiary was operating at this time with a skeleton crew, and did not return to its normal strength until January 3, 1972, the day the plaintiff was released from the M.O. area.

The physical aspects of the cells in the isolated cell area and the mental observation area (which are substantially the same) are primitive at best. However, it is significant that the plaintiff candidly admitted on several occasions he had requested to be placed in the I.C. area because it was more conducive to preparation of legal papers. While it is true that he was fully clothed on these later visits to I.C., it does indicate that the conditions of the cells were not intolerable.

The Court concludes that the defendants' actions were not excessive exercises of authority beyond the limits of civilized standards of decency. *See* Trop v. Dulles, 356 U.S. 86, 100-101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958). Nor were they intended as punishment for the plaintiff's conduct, but, as has been repeatedly stated, they were employed as precautionary measures. The removals of the plaintiff from his cell on the South Wing to isolated cells were not pointless impositions of suffering, nor was there a less severe alternative that would have achieved the purposes for which the confinement was imposed. Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 2747, 33 L. Ed. 2d 346 (1972).

[7] While the plaintiff asserts correctly that punishments which are not *per se* cruel and unusual may become so if they are disproportionate to the offense committed, such is not the case here. He cites LaReau v. MacDougall, 473 F.2d 974, 978 (2d Cir. 1972) for the proposition that confinement in a strip cell, even for short durations of time, falls "below the irreducible minimum of decency required by the Eighth Amendment." However, that case is distinguishable from the ones before this Court. In *LaReau* the prisoner was found in possession of contraband materials. Pursuant

to prison regulations he was punished by the imposition of an indeterminate sentence, and he served five days in isolation. The finding there of cruel and unusual punishment by the Second Circuit appears to have been premised upon the fact that the punishment was disproportionate to the offense committed, and that a less severe punishment would have adequately achieved the purposes for which the punishment was imposed. Such is not the case here. The plaintiff was not confined as a punishment. He was isolated for his own protection and that of the other inmates. He was not confined any longer than was necessary to insure this protection. The placement of the plaintiff was not unreasonable in light of his conduct, nor was there a less severe alternative available to the defendants.

[8] The allegation made in Civil Action No. 72-68-N, that Captain Burrell caused the plaintiff to be denied adequate medical care, is totally without merit. He was taken directly to the dispensary for treatment after the fire was placed under control. The treatment received by the plaintiff was shown to be the appropriate care for the type of injuries that he had allegedly received. Any failure of the medical staff to diagnose the extent of the injuries was directly attributable to the plaintiff's conduct. When he first arrived at the dispensary he was arrogant and refused any treatment. It was due only to the perseverance of Nurse Weber and Officer Martin, and their willingness to spend four times the normal length of time treating the prisoner, that he received any medication at all. Once he was placed in the mental observation area, Nurse Weber contacted Dr. Holljes and informed him of the incident, plaintiff's complaints, the extent of his injuries as she perceived them, and the treatment administered to him. Dr. Holljes instructed her to contact Dr. Stewart, which she unsuccessfully attempted to do. She testified that she did not continue in her efforts to reach Dr. Stewart because at 2 p.m. that same day there were no complaints from the plaintiff. In addition to this treatment, Mr. Musk, a psychologist for the Penitentiary, testified that he saw the plaintiff the week of January 4th concerning the incident.

Even if the plaintiff had not received this care, the Court does not see how Captain Burrell could possibly be held liable. His unrefuted testimony was that he was responsible for the control and security of the hospital, but not for its operations. Clearly, if the plaintiff was not treated properly by the medical staff, which the Court emphasizes was not the case, this could not be attributed to the defendant.

[9] The defendants in these cases also have available to them the defense of reasonable good faith that their actions were constitutionally permissible. Landman v. Royster, 354 F. Supp. 1302, 1317 (E.D. Va. 1973). The applicability of this defense to damage actions brought by a prisoner under § 1983 was recently recognized by the United States Court of Appeals for the Fourth Circuit in Skinner v. Spellman, 480 F.2d 539 (4th Cir., 1973). In that case the Court held that if the defendant could show he was acting in reasonable good faith reliance on standard operating procedure, he would not have to respond in damages.

In Civil Action No. 72-234-N, the testimony established that the plaintiff was causing a disturbance on the South Wing, and that the other inmates requested he be removed. It was also brought out in the cross-examination of Sgt. Smith that he had the authority to place an inmate in the I.C. area, and that after such action he was to immediately notify his immediate superior. There was no evidence introduced which would lead this Court to believe that Sgt. Smith had not notified his superior. The defendant Smith also stated there was a verbal understanding on the South Wing that an inmate was not to be kept in isolation for more than three days. This procedure was followed in this case.

In Civil Action No. 72-68-N, Captain Burrell followed an Administrative directive when he confined the plaintiff in the Mental Observation area after the latter apparently started a fire in his cell. Defendant stated

that it was a normal operating procedure to remove the clothes of a prisoner who had exhibited an unstable mental and emotional state.

Therefore, since the defendants, as shown from all the facts, acted in good faith in exercising their discretion, Bennett v. Gravelle, 323 F. Supp. 203, 214 (D. Md. 1971), they are immune from suit under 42 U.S.C. § 1983.

For the reasons stated herein, it is this 16th day of October, 1973, ordered:

1. That the defendants' Motions to Dismiss in Civil Actions Nos. 72-68-N and 72-234-N be, and the same hereby are, granted;

2. That plaintiff's claim for relief in Civil Action No. 72-68-N be, and the same is, denied; and

3. That the plaintiff's claim for relief in Civil Action No. 72-234-N be, and the same hereby is, denied.

APPENDIX A

Habeas Corpus and 42 U.S.C. § 1983 Civil Rights Suits Filed by Milton McCray in the United States District Court for the District of Maryland

1. Milton McCray v. State of Maryland (H/C) — 15745/62

Suits filed in 1970 (9)

2. Milton McCray v. Forrest Calhoun, Jr. (C.R.) — 70-164-W

3. Milton McCray v. Director Patuxent Institution, et al. (C.R.) — 70-634-N

4. Milton McCray v. State of Maryland (C.R.) — 70-1047-N

5. Milton McCray v. Eva Sacks (C.R.) — 70-1064-N

6. Milton McCray v. State of Maryland (H/C) — 70-1407-N

7. Milton McCray v. John O. Rutherford, Clerk of the Baltimore City Court (C.R.) — 70-1409-N

8. Milton McCray v. Mr. Calhoun, et al. (C.R.) — 70-1410-N

9. Milton McCray v. Mr. Boslow, etc. (C.R.) — 70-1411-N

10. Milton McCray v. Mr. James A. Hall (C.R.) — 70-1412-N

Suits filed in 1971 (9)

11. Milton McCray v. Patuxent Institution (C.R.) — 71-184-N

12. Milton McCray v. Mr. Calhoun (C.R.) — 71-237-N

13. Milton McCray v. Dr. Boslow and Staff (C.R.) — 71-238-N

14. Milton McCray v. Dr. Boslow, et al. (C.R.) — 71-239-N

15. Milton McCray v. Judge Sklar, et al. (C.R.) — 71-240-N

16. Milton McCray v. Hon. Judge A. Sklar (C.R.) — 71-552-N

17. Milton McCray v. Director Patuxent Institution (H/C) — 71-991-N

18. Milton McCray v. Honorable Judge Sklar, etc. (C.R.) — 71-1200-N

19. Milton McCray v. Warden Maryland Penitentiary (C.R.) — 71-1395-N

Suits filed in 1972 (14)

20. Milton McCray v. Warden of Maryland Penitentiary (C.R.) — 72-68-N

21. Milton McCray v. Warden of Maryland Penitentiary (C.R.) — 72-69-N

22. Milton McCray v. Sergeant V. D. Smith (Badge No. 153), Maryland Penitentiary — (C.R.) — 72-234-N

23. Milton McCray v. L. R. Mooney, et al. (C.R.) — 72-463-N

24. Milton McCray v. Warden Maryland Penitentiary (C.R.) — 72-483-N

25. Milton McCray v. Mr. M. Hawkins, Warden Maryland Penitentiary (C.R.) — 72-484-N

26. Milton McCray v. Paul R. Schlitz (C.R.) — 72-485-N

27. Milton McCray v. Mr. Horowitz, States Attorney (C.R.) — 72-521-N

28. Milton McCray v. Patuxent Institution (C.R.) — 72-661-N

29. Milton McCray v. Francis B. Burch, Attorney General of Maryland, et al. (C.R.) — 72-783-N

30. Milton McCray v. Director of Patuxent Institution (C.R.) — 72-918-N

31. Milton McCray v. Off. Butterworth, et al. (C.R.) — 72-919-N

32. Milton McCray v. Warden Maryland Penitentiary, et al. (C.R.) — 72-1119-N

33. Milton McCray v. Warden Maryland Penitentiary, et al. (C.R.) — 72-1139-N

34. Milton McCray v. Mr. Gerald McClellan, Warden, et al. (C.R.) — 72-1172-N

Suits field in 1973 (3 as of 4/5/73)

35. Milton McCray v. State of Maryland Officials (C.R.) — 73-55-N

36. Milton McCray v. Mr. Richard Kinlein (C.R.) — 73-89-N

37. Milton McCray v. Mrs. Tucker Maryland Penitentiary, et al. (C.R.) — 73-269-N

APPENDIX B

In The United States District Court
for Maryland

Civil 72-69-N

Milton McCray 110563
v.
Warden, Md. Pen.

SUIT

To the Honorable Judge of said Court.

Petitioner, Milton McCray, and Officer Furrell of Md. Penitentiary had a pornography business going in the institution which profited them an average of seventy dollars a week. Because Officer Furrel did not know how much money petitioner was making he received between $15 to $20 a week or approximately $80 to 90 dollars a month.

HOW THE MONEY WAS MADE

Pornography and sex books are prohibited in this institution therefore are in great demand by the inmate. Because of petitioner connection and reliable source Officer Furrel he had, at the time Mr. Furrell set him up to be caught, over fifty very good sex books.

Petitioner Rent said book for 2, 3, or 5 packs a night averaging 7 to 8 cartons a night which are sold to the inmates at 4 packs for a dollar bring $15 or more in cash per night.

When petitioner was set up, Mr. Furrell and officers unknown went into petition's cell while he was working on Dec. 16, 1971 broke into petitioners locker, which was unnecessary since all they had to do was call petitioner and request the key, took (23) twenty-three sex books and ($275) two hundred and seventy-five dollars and (95) ninety-five packs of cigarettes.

When petitioner returned to his cell the door was open and all his valuable were gone either the officers had taken them or the inmate as a result of the officers, Mr. Furrell deliberately and spitefully leaving petitioners cell door open had taken them.

Petitioner immediately reported what had happened to his cell to the officer in charge who sent him to the major office.

Petitioner explained what had happened to the major who refused to investigate the matter properly. Petitioner requested that something be done about his property. Major Mills ordered petitioner locked in the hole. Four officer grab petitioner and when petitioner resisted the unexpected and brutal treatment he was beat cruelly with fist and magazines and thrown in the hole nude.

Petitioner was charged and tried but because petitioner had taped two of the business conversation the charges were dismissed.

PETITIONER CONTEND

(1) That Mr. Furrell and officers had no right in petitioners cell without petitioner being present and a supervisor.

(2) That Mr. Furrell and officers had no right burglarizing petitioner locker (breaking lock) when all they had to do was request key from petitioner.

(3) That the following personal property was stolen or confiscated.

1) One set of law books	$ 50.00
2) One box of daily record papers	$200.00
3) One lock (cost 15 packs)	$ 5.00
4) 15 cassettes a $9 each	$135.00
5) 95 packs of cigarettes	$ 35.00
6) $275 in cash	$275.00
7) 2 mens watches	$185.00
8) 11 pair of silk underwear	$ 77.00
9) One cassette taperecorder	$ 50.00
10) One suit	$ 85.00
11) One shoes	$ 35.00
12) 6 shirts	$ 75.00
13) 1 leather jacket	$ 85.00
14) One AC triple jack adapter	$ 9.00
15) One microphone	$ 15.00
16) 7 pair of socks	$ 18.00
17) 3 pair of pants	$ 60.00
18) 23 sex books	$ 70.00

(4) That the institution admit to the lost of

1) 1 pair of pants	$ 20.00
2) 1 leather jacket see no. 13 above	$ 85.00
3) 1 shirt	$ 16.00
4) 2 cassettes tape $1000.00 because they contained the taped conversation between petitioner and officer Furrell.	

Wherefore petitioner pray that this Honorable Court will grant him $500,000 in damages etc. for Mr. Furrell's and officers deliberate and spiteful negligence in leaving his cell open and for the confiscation of petitioners personal property.

s/ MILTON MCCRAY,
Petitioner.

I, Milton McCray, hereby certify that due to my poverty I am unable to pay the cost of this proceeding or give security therefor.

s/ MILTON MCCRAY.

APPENDIX C

In the Court of Maryland United States District

Civil 72-67-N

January 13, 1972

Milton McCray 110563
v.
Warden Md. Penitentiary

SUIT

To the Honorable Judge of Court.

On January 1, 1972 petitioner, Milton McCray's cell caught on fire, resulting from a lit cigarette falling from his hand into some paper while he was asleep. When he woke up his cell was blazing.

A officer ran up to the door with a fire extinguisher but nothing would come out.

PETITIONER CONTEND

1. That the officer deliberately bought the empty fire extinguisher to his door knowing that it was empty. He could not help but know it was when he picked it up.

2. That said officer after finding out that said extinguisher was empty ran away and stayed for an eternity. The fire extinguisher being empty almost cost petitioner his life.

3. That the officers deliberately took their time putting the fire out, causing him to suffer first degree

burns on the face, ears, hand, and arms. He is also having lung trouble.

4. That he has been denied medical treatment for two weeks.

5. That he has been laying on the floor suffering for over two weeks because no doctor would treat him.

6. That each doctor that saw him referred him to another doctor therefore no treatment was received, administered.

7. That because of the doctors deliberate spiteful and unprofessional negligence petitioner has suffered much pain.

8. That because of the deliberate negligence of the persons responsible the empty fire extinguisher has caused petitioner to suffer unnecessarily.

Wherefore petitioner pray that this Honorable Court will award him his immediate release and $500,000 in damages.

s/ MILTON MCCRAY

I, hereby, certify due to his poverty, he is unable to pay the cost of this proceeding or give security therefor:

s/ MILTON MCCRAY

APPENDIX D

In the Superior Court of
Baltimore City

June 25, 1973

Milton McCray
v.
Warden of Maryland Penitentiary

DECLARATION

To the Honorable Judge of said Court:

On January 1, 1972, petitioner, Milton McCray's cell caught on fire resulting from a lit cigarette falling from his hands into some paper while he was asleep. When he awakened his cell was blazing. A officer ran to McCray's cell door with a fire extinguisher but nothing came out. The officer ran away. He refused to open the cell door to let petitioner out of the burning cell.

PETITIONER CONTEND

(1) That the defendant's, Warden and staff, lack of proper care and attention to the rules and laws governing fire extinguishers and fire control has caused him injury, pain and suffering.

(2) That the defendant's failure to properly inspect and immediately refull the institutions fire extinguishers pursuant to rules and laws governing fire extinguishers and fire control has caused him to suffer first degree burns of the face, ears, hands and back.

(3) That the defendant's carelessness and indifference to their duties and responsibilities concerning fires in inmates cells and fire control within the institution

has caused him great injury, pain, suffering and mental anguish.

Wherefore petitioner claims $50,000 compensative damages and 75,000 punitive damages.

Petitioner respectfully requests a Jury Trial.

s/ MILTON MCCRAY,
954 Forrest Street,
Baltimore, Maryland

John Washington

v.

Dr. Harold M. Boslow, Director Patuxent Institution,

and

Dr. Domingo C. Sorongon, M.D., Patuxent Institution.

Civ. No. 73-1025-N.

United States District Court, D. Maryland.

May 17, 1974.

As Amended May 22, 1974.

[*375 F. Supp. 1298 (D. Md., 1974)*]

Charles F. Morgan, Baltimore, Md., for plaintiff.

Francis B. Burch, Atty. Gen. of Maryland, John P. Stafford, Jr., and Donald R. Stutman, Asst. Attys. Gen., for defendants.

NORTHROP, Chief Judge.

John Washington, an inmate at the Patuxent Institution for defective delinquents, brings this action pursuant to 42 U.S.C. §1983 (1970) against Harold M. Boslow, Director of Patuxent Institution, and Dr. Domingo C. Sorongon, staff physician at Patuxent Institution, alleging that the defendants failed to provide the plaintiff with proper medical care in violation of the eighth and fourteenth amendments to the U.S. Constitution. For relief, the plaintiff requests that this Court (1) enter a judgment declaring that the defendants' acts, policies, and practices contravene the plaintiff's constitutional rights and (2) enter a judgment awarding compensatory and punitive damages. The defendants have moved to dismiss the instant suit on the sole ground that under this Court's opinion in McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973) (hereinafter referred to as *McCray*), a prisoner must exhaust the state administrative remedies provided by the Maryland Inmate Grievance Commission Act, Md. Ann. Code art. 41, § 204F (Supp. 1973), before he can maintain an action under §1983, and the plaintiff has not complied with this requirement. In response, the plaintiff contends that under existing case law there is no requirement of exhaustion of state administrative remedies in §1983 suits. Even if there is such a requirement, the plaintiff argues that he need not resort to the Inmate Grievance Commission because this remedy is inadequate since, among other relief, he seeks a monetary award, because he will be deprived of his jury trial right, and because the Commission does not accord him a full and fair hearing.

I.

[1] In *McCray*, this Court made a thorough analysis of the case law under section 1983 and found that this judicial precedent did not preclude requiring exhaustion of state administrative remedies where the administrative proceedings provide a fair and adequate remedy. *McCray*, 367 F. Supp. at 1196-1201, 1209-1210. This

Court adheres to the principle of *McCray* and finds no reason to alter its opinion in that case. The recent Supreme Court case of Steffel v. Thompson, 415 U.S. 452, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974), cited by the plaintiff, is inapposite. While the Court in *Steffel* did state at one point that "[w]hen federal claims are premised on 42 U.S.C. § 1983 . . . we have not required exhaustion of state judicial or administrative remedies . . ." (94 S. Ct. at 1222), the factual and legal setting for this statement differs markedly from the instant case. The only question addressed by the Supreme Court was whether under Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971) and Samuels v. Mackell, 401 U.S. 66, 91 S. Ct. 764, 27 L. Ed. 2d 688 (1971), "declaratory relief is precluded when a state prosecution has been threatened, but is not pending, and a showing of bad faith enforcement or other special circumstances has not been made." 94 S. Ct. at 1213. Since exhaustion will be required by this Court, the only remaining issue is whether the Inmate Grievance Commission Act in the instant case accords the plaintiff a fair and adequate remedy.

[2] The plaintiff finds inadequacy in several areas of the Inmate Grievance proceedings. The plaintiff first asserts that the inability of the Commission to award damages is a fatal flaw to its effectiveness. A short answer to this contention would be that the plaintiff seeks both equitable and legal relief in this suit and, as stated in *McCray*, 367 F. Supp. at 1208-1210, the Inmate Grievance Commission has been invested with powers comparable to the equity power of a federal court, and the prisoner will not be prejudiced by delaying an award of damages until the Inmate Grievance procedures have been exhausted. This Court, however, has gone one step further. If the only relief requested is an award of damages, the Inmate Grievance Commission Act still provides an adequate remedy to the prisoner. "The claim for monetary damages is inextricably tied to prison regulations and disciplinary procedures." *McCray*, 367 F. Supp. at 1210. Even though the prisoner may not assert it, there is an ever-present possibility

that the conditions giving rise to the prisoner's claim for damages may still exist and go uncorrected if the prison authorities are not fully apprised of them. Dene L. Lusby, Executive Director of the Inmate Grievance Commission, stated in his deposition of February 28, 1974 in this case, that when a grievance requesting only damages is filed, a hearing is held for the purpose of, *inter alia*, determining the validity of the claim. If the grievance is meritorious in whole or in part, the Commission would then recommend procedures designed to prevent a recurrence of the situation.

If the specific condition producing the harm will not happen again, the Inmate Grievance procedures still perform a vital function in the overall process of securing a damage award. "The Maryland Inmate Grievance Commission provides a forum with built-in judicial review which can more expertly sort out the meritorious from the frivolous . . . [and] having taken this route the complaining prisoner can come to this Court with the issue of liability clearly defined on the record." *McCray*, 367 F. Supp. at 1210. While a determination of the Grievance Commission or the state courts on the merits of a prisoner's claim is not binding on this Court, a preliminary indication of validity serves as a valuable aid to a federal court. With 103 prisoner civil rights cases presently pending in the District of Maryland, a meritorious claim, of which there are few, in all likelihood cannot possibly be processed as rapidly as the State grievance procedure. Initial action by the Inmate Grievance Commission serves to alert this Court to a case in which constitutional deprivations are likely to have occurred, and this Court can move the case into its regular trial calendar.

A reasonably expeditious resolution of a prisoner's grievance can then be obtained since this Court will have before it a complete record of the controversy. Each hearing before the Commission is recorded on a Voicewriter and transcribed when an inmate seeks judicial review in the state courts. The transcript, coupled with the findings of the Commission and state courts, can be employed by this court to arrive at the

central issues for trial, thereby significantly reducing the trial time involved.

Thus the relief available from the Inmate Grievance Commission, although not exactly comparable to an award of damages, is critical to the welfare of the inmate, to the proper administration of the correctional institution, and to the expeditious resolution of the inmate's grievance.

[3] The plaintiff next argues that requiring exhaustion of state administrative remedies will deprive plaintiff of his right to a jury trial. At the threshold, this contention assumes that there is a right to a jury trial in a § 1983 suit. Only a few courts have directly addressed this issue, and their conclusions are in conflict. *Compare* Lawton v. Nightingale, 345 F. Supp. 683 (N.D. Ohio 1972) *with* Cook v. Cox, 357 F. Supp. 120 (E.D. Va. 1973). If there is a right to a jury trial, this Court fails to see how resorting first to the Inmate Grievance Commission will prejudice a prisoner's jury trial right. These administrative proceedings will not estop the plaintiff from having those issues appropriate for jury resolution fully tried before a jury.

[4] The plaintiff last asserts that the Inmate Grievance Commission Act does not accord the plaintiff a full and fair hearing within the meaning of the due process clause. In *McCray*, this Court discussed extensively the Inmate Grievance procedures and found that these procedures satisfied the requisites of due process. The plaintiff argues here, however, that at a hearing before the Commission he is unreasonably restricted in his ability to call and cross-examine witnesses and subpoena documents, and that he is unable to engage in pre-trial discovery. An inmate has the right to call a reasonable number of witnesses, subject only to the discretion of the Commission as to the relevancy or cumulative nature of the testimony, and this discretion cannot be unreasonably exercised by the Commission. Md. Ann. Code art. 41 § 204F(h) (Supp. 1973). Any unreasonable refusal to allow an inmate to call a witness is reviewable in state court.

Again, the inmate has a right to subpoena documents, and this right is subject only to the Commission's determination of the usefulness of the documents in deciding the merits of the claim. Public Safety and Correctional Services R. 12.07.00.04(2) (Inmate Grievances). This right may not be unreasonably restricted by the Commission, and any such action is reviewable in state court. While the plaintiff does not have the right to full pre-trial discovery, he has not cited to any case that holds discovery to be an essential element of due process. This Court finds that the lack of full discovery does not render the hearing "unfair." *Cf.* Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

[5] The broad authority of the Secretary of the Maryland Department of Public Safety and Correctional Services to review the orders of the Inmate Grievance Commission is also attacked as violative of the plaintiff's due process rights. Specifically, the plaintiff states that the Secretary, in deciding whether to affirm, modify, or reverse the Commission's order, is able to go outside the record and consider additional evidence. The plaintiff, however, has cited to only one case in which the Secretary actually employed new evidence in his decision. That case, in re Midgett, Minnick & Minnick, I.G.C. #1295, #1282 (consolidated), involved a riot at the Maryland Penitentiary that occurred after the decision of the Grievance Commission and rendered compliance with the Commission's order impossible. In his deposition, Secretary Robert J. Lally, clearly indicated that only in those circumstances where it is impossible to carry out the Commission's recommendations is the order modified or reversed based on information outside of the record. In all other cases the Secretary will remand for the taking of further evidence.

If the Secretary could exercise his authority in any other manner prejudicial to a full and fair hearing, a representative sampling of his actions in reviewing the Commission's orders indicates that he has not done so in practice. From November 19, 1973 to February 20,

1974, 33 prisoner complaints were found meritorious in whole or in part by the Commission. Of that number 31 have been reviewed by the Secretary with the following results: 28, or over 90% were affirmed without modification; 3, or less than 10%, were affirmed as modified; and *none* were reversed. Any future disposition of the Secretary to act in an arbitrary manner is inhibited by the review available in state court. Where in Toney v. Reagan, 467 F. 2d 953 (9th Cir. 1972), a University President had the power to overrule the recommendation of a faculty committee on rehiring, the grievance procedure for teachers who were not rehired was not inadequate, because there was a carefully constructed appeal to the Chancellor's Review Committee, and this appeal was a reasonable check against an arbitrary decision of the President.

In sum, this Court, after a second look, finds that the Inmate Grievance Commission Act provides a fair and adequate remedy to the plaintiff. The inability of the Commission to award damages is not fatal to the efficacy of its remedy. In deed, the Act furthers the inmate's claim appreciably by alerting this Court to a meritorious grievance and by providing a record of the proceedings. At the hearing before the Commission the inmate is accorded all of the procedural rights mandated by the due process clause. The Secretary's review authority also does not contravene due process since in practice he has not exercised this authority in an arbitrary or prejudicial manner, and any inclination to do so is checked by the availability of state judicial review.

II.

This case is a good example of the type of complaint which should be subject to the Inmate Grievance Commission screening so that it may be determined whether any acts, policies, or practices of prison personnel in any way violated this inmate's constitutional rights as articulated in 42 U.S.C. § 1983. If they were not, this suit, at best, is a straight tort action

medical malpractice which belongs in a state court. It is difficult for this Court to believe that Section 1983 jurisdiction should be extended to such an action. It would, in effect, give an inmate a right to resort to the federal courts beyond that of an individual citizen of a state. If, on the other hand, the claim is a meritorious one under Section 1983, the state procedure would sharpen the issues and furnish a record which, if necessary, could be supplemented in this U. S. District Court on the damage claim.

Most importantly, the State would have had the first opportunity to put its prison in order.

The United States Supreme Court recognized this "paramount state interest" in Preiser v. Rodriguez, 411 U.S. 475, 93 S. Ct. 1827, 1837-1838, 36 L. Ed. 2d 439 (1973).

> It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State. Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems. Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most

part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances. In New York, for example, state judges sit on a regular basis at all but one of the State's correctional facilities, and thus inmates may present their grievances to a court at the place of their confinement, where the relevant records are available and where potential witnesses are located. The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons. [Footnote omitted].

The observations of Judge Ruggero J. Aldisert, United Stated Circuit Judge of the U. S. Court of Appeals for the Third Circuit, as set out in *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on section 1983, Comity and the Federal Caseload*, 1973 Law & Soc. Order 557, 566-67, (published by the Arizona State University Law Journal) is particularly appropriate in summing up the whole situation:

There is also a point of view which first came to me over a cup of coffee from an experienced and sensitive federal trial judge, whose record proves he has been concerned with protecting the rights of the state prisoners. In discussing this subject, he admitted an abiding concern that, in his efforts to improve the lot of many prisoners, he was actually producing the opposite effect. The judge commented that he was afraid he had been playing warden, but was not sure that he had succeeded well. He remarked that while he thought he had given the prisoners their constitutional rights, he had also crippled prison discipline. The guards were now scared; what is more, they were demoralized. He observed that guards are now taunted,

abused and spat upon that competent personnel are leaving. As a consequence, many of the prisoners are at the complete mercy of other prisoners — toughs and bullies who are having a field day. In short, the judge was very much afraid that the federal judiciary had made a serious mistake. The courts had given birth to something and now could not put the baby back.

Meanwhile prisoners' petitions continue to inundate the federal courts, pathetic, handwritten grievances; some very real; some rather illusory; some with genuine constitutional issues; some merely stating disagreements with administrative decisions. This litigious flood consumes many judicial manhours and challenges the abilities of federal courts to cope with their own calendars. Mr. Justice Powell's recent statement concerning state habeas corpus in the federal system is equally applicable to prisoners' civil rights claims: "The current flood of petitions . . . already threatens — because of sheer volume — to submerge meritorious claims and even to produce a judicial insensitivity to . . . petitioners."[43]

Statistics vividly illustrate Justice Powell's point. In 1966, there were 218 civil rights petitions filed by state prisoners in federal courts. Six years later, in fiscal 1972, there were 3,348 petitions filed. Last year, the percentage increase over the previous year was 19.4 percent. In that same year there were a total of 96,173 civil filings in the federal district courts; of these, 16,267 were prisoner petitions of all kinds. Thus, one out of every six civil cases which came before a district court judge last year was a prisoner petition. We are told that

> if prisoner petitions were dropped from federal court statistics the number of civil cases filed in the first six months of fiscal year 1973 would have been 39,533, only 1.1 percent more than the

[43] Boyd v. Dutton, 405 U.S. 1, 8, 92 S. Ct. 759, 30 L. Ed. 2d 755 (1972) (Powell, J., dissenting).

comparable figure (excluding prisoner petitions) from the last year.[44]

The Freund Committee[45] met this phenomenon with refreshing candor:

> The number of these petitions found to have merit is very small, both proportionately and absolutely. But it is of the greatest importance to society as well as to the individual that each meritorious petition be identified and dealt with. And yet it seems a misallocation of resources to impose the burden of sifting through the mass of these petitions on federal judges, let alone Supreme Court justicies.[46]

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[44] 1973 SEMI-ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 20. The 1973 Semi-Annual Report discloses 8,072 prisoner petitions out of a total filings of 47,625 or 17.0 percent. *Id.* Figure 12. In the Fourth Circuit, 27.6 percent of all civil filings were prisoner petitions. Of 12,379 total appeals from district courts in fiscal 1972, there were 6,601 prisoner appeals (or direct criminal appeals on collateral review or civil rights actions), 53.3 percent of the entire appellate docket from district courts. *Id.* Figure 5.

[45] ADMINISTRATIVE OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CENTER REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972) [hereinafter cited as FREUND COMMITTEE].

[46] *Id.* at 13.
While the deluge of prisoner petitions descends upon the federal courts, nothing is directed to the state courts, to the state judges who ordered incarceration in the first instance. And while state courts clearly have inherent power to require the establishment of administrative procedures to process prisoner complaints and to deal with legal problems generated by prison life, under recent case law it is the federal judge who must listen to state prisoner complaints. Even acknowledging the basic responsibilities of an Article III judge to be hospitable to constitutional claims, the federal judiciary's receptiveness to prisoners' civil rights claims no longer makes sense in view of the burgeoning federal case load.

Where a state had established a grievance procedure such as in Maryland, federal intrusion into the state penal system can only fire-up an already incendiary atmosphere.

For these reasons, it is this 17th day of May, 1974, Ordered:

1. That the defendants' Motion to Dismiss be, and the same hereby is, granted.

2. That the clerk of court is directed to mail copies of this Opinion to Charles F. Morgan, Esquire, attorney for plaintiff, and the Donald R. Stutman, Assistant Attorney General of Maryland.

In the United States District Court
For The District of Maryland

Civil No. 73-1182-B

James E. X. Stokes

v.

Gerald McClellan, etc., et al.

MEMORANDUM

Plaintiff, an inmate of the Maryland Penitentiary, had brought this action under 42 U.S.C. § 1983 against the Warden of the penitentiary, Gerald McClellan, and against the mail censor of the Maryland Department of Corrections. He seeks to enjoin an alleged violation of his constitutional rights. He also seeks compensatory damages. Leave to file in forma pauperis has previously been granted pursuant to 28 U.S.C. § 1915.

The complaint charges that certain literature that plaintiff has attempted to subscribe to had been

returned to the sender with "not approved" or "disapproved" affixed thereon. The publications in question are Akwesasne Notes, described by plaintiff as "a Native American newspaper", and the Gay Liberator.

The Attorney General of Maryland, as counsel for the defendants, has moved, *inter alia,* that the suit be dismissed on the authority of *McCray v. Burrell, et al.,* C.A. Nos. 72-68-N and 72-234-N, 367 F. Supp. 1191 (D. Md., Oct. 16, 1973), until such time as the plaintiffs have pursued the complaints giving rise to this suit through the inmate grievance procedure established pursuant to Art. 41, § 204(f), *Annotated Code of Maryland* (1972 Cum. Supp.).

This court is in complete accord with Chief Judge Northrop's opinion in *McCray, supra,* notwithstanding the fact that a part of the relief sought herein is damages for the deprivation of plaintiff's constitutional rights. *Smithson, et al. v. Boslow, et al.,* C.A. No. 73-1181-B (D. Md., Jan. 25, 1974). As a result, the court will dismiss the action without prejudice.

In so doing, the court and the parties will have the benefit of an orderly development of facts and issues through the grievance procedure. If the issues that relate to the injunctive relief that plaintiff seeks are therein resolved, he will then be free to assert his damage claim in this court.

Accordingly, the complaint will be dismissed without prejudice to allow the plaintiff to seek relief through the Inmate Grievance Commission. Upon completion of those procedures, he may institute a further action in this court if he is dissatisfied with the results achieved. An order will be entered separately.

C. STANLEY BLAIR,
United States District Judge.

Date: April 1, 1974.

ORDER

For the reasons set forth in a Memorandum of even date filed in this case, it is this 1st day of April, 1974, by the United States District Court for the District of Maryland ORDERED and ADJUDGED:

1. That the complaint is dismissed without prejudice to its reinstitution upon exhaustion of remedies available through the Maryland Inmate Grievance Commission pursuant to Article 41, § 204(f), *Annotated Code of Maryland* (1972 Cum. Supp.).

2. That the Clerk of the Court is directed to send a copy of this Order and a copy of the Memorandum to the plaintiff, the Attorney General of the State of Maryland, and the Inmate Grievance Commission.

C. STANLEY BLAIR,
United States District Judge.

United States Court of Appeals
For The Fourth Circuit

No. 74-1042

Milton McCray,
Appellant,
v.
Robert Burrell,
Appellee.

No. 74-1043

Milton McCray,
Appellant,
v.
Sergeant V. D. Smith (Badge No. 153)
Md. Penitentiary,
Appellee.

No. 74-1456

James E. X. Stokes,
Appellant,
v.
Gerald McClellan, individually and in his official capacity as Warden of the Maryland Penitentiary, and The Mail Censor, individually, and in his official capacity as mail censor of the Maryland Department of Corrections,
Appellees.

No. 74-1634

John Washington,
Appellant.
v.
Dr. Harold M. Boslow, Director, Patuxent Institution, and Dr. Domingo C. Sorongon, M.D., Patuxent Institution,
Appellees.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, Chief Judge, in Nos. 74-1042, 74-1043, and 74-1634; C. Stanley Blair, District Judge, in No. 74-1456.

Argued October 1, 1974 Decided April 10, 1975

Before Haynsworth, Chief Judge, Winter, Craven, Butzner, Russell, Field and Widener, sitting en banc.

Nos. 74-1042, 74-1043, 74-1456 and 74-1634. Charles F. Morgan, Prisoner Assistance Project, Legal Aid Bureau, Inc., (Michael S. Elder and Michael A. Millemann on brief) for Appellant in Nos. 74-1042, 74-1043, 74-1456 and 74-1634; Frank Wiggins, National Legal Aid and Defender Association, (Robert Plotkin, National Legal Aid and Defender Association, on brief) for Amicus Curiae in Nos. 74-1042, 74-1043, 74-1456 and 74-1634; (Barbara Gold, American Civil Liberties Union, Maryland Affiliate, on brief for Amicus Curiae); Donald R. Stutman, Assistant Attorney General of Maryland, (Francis Burch, Attorney General of Maryland, Clarence W. Sharp and Gilbert Rosenthal, Assistant Attorneys General of Maryland on brief) for Appellee in Nos. 74-1042, 74-1043, 74-1456 and 74-1634.

WINTER, Circuit Judge:

These appeals present the common question of whether a prisoner, incarcerated under state process, is required to exhaust available state remedies before the district court may or should exercise jurisdiction in a suit under 42 U.S.C. § 1983 for the redress of alleged deprivations of civil rights arising out of his incarceration. Some of these appeals were heard but not decided by a panel of the court. Because each presents the same question of exceptional importance, we consolidated them and heard them in banc.

In No. 74-1042 and No. 74-1043, plaintiff McCray, an inmate of the Maryland Penitentiary, sought relief under § 1983 for deprivations of liberty without due process of law and for imposition of cruel and unusual punishment arising out of two separate incidents in which he was allegedly placed naked in an isolation cell for a period of 48 hours. In No. 74-1042, he sought only compensatory and punitive damages. In No. 74-1043, his inartfully drawn *pro se* complaint may be read to seek injunctive relief as well as damages. Both cases were consolidated in the district court and tried nonjury. The district court dismissed both complaints with prejudice. The district court found that before suing under § 1983, McCray was required to exhaust the state administrative remedy established by the Maryland Inmate Grievance Commission Act, 4A Ann. Code of Md., Art. 41, § 204F (1973 Cum. Supp.), through which he could have obtained relief for the deprivation of his constitutional rights; and that since McCray had not exhausted his remedies under that statute he was not entitled to federal relief. McCray v. Burrell, 367 F.S. 1191 (D. Md. 1973). On the merits, it found that no constitutional violations had occurred in the incidents alleged; that each defendant, in the incident in which he was concerned, had acted in good faith reliance upon standard operating procedures and, hence, was immune from liability in damages.

In No. 74-1456, plaintiff Stokes, another inmate of the Maryland Penitentiary, filed a *pro se* civil rights

complaint in the district court alleging that prison officials had violated his first and fourteenth amendment rights by denying him permission to receive and read two national political newspapers, the Gay Liberator and Akwesasne Notes. He sought declaratory relief, injunctive relief and damages, both compensatory and punitive. On defendant's motion, the district court summarily dismissed the complaint for failure to exhaust the available state administrative remedy, relying on the alternative holding in the two *McCray* cases.

In No. 74-1634, plaintiff Washington, an inmate of the Maryland Patuxent Institution, filed a *pro se* complaint under 42 U.S.C. § 1983, alleging that he suffered injuries and deprivations of his constitutional rights as a result of the failure of a prison doctor to provide him with necessary medical care. He demanded a trial by jury, and he sought declaratory relief and compensatory and punitive damages. On the defendant's motion, his complaint was dismissed for failure to exhaust state administrative remedies. The ruling was more in the nature of a summary judgment because the district court received evidence concerning the adequacy of the administrative remedy under the Maryland Inmate Grievance Commission Act as a state administrative remedy for the purpose of exhaustion. The district court found that the Inmate Grievance Commission Act provided plaintiff with a fair and adequate remedy, notwithstanding the inability of the Commission to award damages in an appropriate case. Washington v. Boslow, 375 F.S. 1298 (D. Md. 1974).

We keenly appreciate the force of the factors identified by the district court in *McCray* and *Washington* as supporting a policy determination that exhaustion of available administrative remedies should be required of prisoners of correctional institutions in Maryland as a prerequisite to a suit under § 1983.

We recognize the burden which the increasing flood of prisoner complaint litigation places upon the already overtaxed district courts as well as ourselves. Neverthe-

less, we are constrained to conclude that the holding that exhaustion is required may be reached only by either legislation conditioning resort to 42 U.S.C. § 1983 upon the exhaustion of available administrative remedies, or by the Supreme Court's re-examination and modification of its controlling adjudications on the subject. Congress has not enacted such legislation. The Supreme Court has not yet begun a re-examination of its previous holdings and we have no basis on which to predict that it will, or, if so, with what result. We think that we have no alternative but to hold that exhaustion may not be required.

Accordingly, we reverse in Nos. 74-1456 and 74-1634 and remand the cases for determination on the merits. In Nos. 74-1042 and 74-1043, we reach the merits and conclude for reasons hereafter stated that reversal and remand for further proceedings are indicated there also.

I.

We consider first the question common to all four appeals — whether a prisoner must exhaust available state administrative remedies before a district court may exercise its jurisdiction under 28 U.S.C. § 1343 to adjudicate the merits of a claim under 42 U.S.C. § 1983 that there has been a deprivation of civil rights in prison treatment.

The doctrine of exhaustion of federal administrative remedies has broad application in the law. McKart v. United States, 395 U.S. 185, 193 (1969). Exhaustion of state administrative and judicial remedies is also a familiar doctrine. It is a part of the law of federal habeas corpus both by adjudication, *Ex parte* Hawk, 321 U.S. 114 (1944), and cases cited therein, and by statute, 28 U.S.C. § 2254(b).[1] Prior to enactment of the

[1] Although *Ex parte* Hawk, 321 U.S. 114 (1944), and 28 U.S.C. § 2254(b) treat directly only state judicial remedies, Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973), makes clear that exhaustion of state administrative remedies is also required before a federal court may entertain a habeas petition.

Johnson Act, 28 U.S.C. § 1342, when federal courts reviewed the reasonableness of state rate orders with some frequency, it was held that state judicial remedies must be exhausted before a railroad company could seek to enjoin the enforcement of a rate order of the Virginia State Corporation Commission in a district court. Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908). Exhaustion of state administrative remedies is many times required as a prerequisite to suits against state officer. *See, e.g.*, Illinois Commerce Commission v. Thompson, 318 U.S. 675 (1943); First National Bank v. Board of County Commissioners, 264 U.S. 450 (1924).

Monroe v. Pape, 365 U.S. 167 (1961), is the seminal decision with respect to the need for exhaustion in actions brought under 42 U.S.C. § 1983. There, in a suit under § 1983 to redress shocking violations of fourth amendment rights, the claim was made that plaintiffs should have exhausted their state *judicial* remedies before suing in a federal court, but the argument was rejected:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy [§ 1983] is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court. 365 U.S. at 183.

While Monroe v. Pape constituted no radical departure from the preexisting doctrine of exhaustion of state *judicial* remedies, it was applied two years later in McNeese v. Board of Education, 373 U.S. 668 (1963), as authority for the proposition that in suits under § 1983 there was also no need to exhaust state *administrative* remedies. In *McNeese*, plaintiffs sought to enjoin racial segregation in an Illinois public school system. The district court granted a motion to dismiss the complaint on the ground that plaintiffs had not exhausted the administrative remedies provided by Illinois law, and

the Court of Appeals affirmed on the same theory. In reversing, the Supreme Court called attention to its holding in Monroe v. Pape that one purpose of § 1983 was "to provide a remedy in the federal courts supplementary to any remedy any State might have." 373 U.S. at 672. Specifically, it said, "[i]t is immaterial whether respondents' conduct is legal or illegal as a matter of state law. Such claims are entitled to be adjudicated in the federal courts." 373 U.S. at 674 (citations omitted). It is true, as the district court noted, *McCray*, 367 F.S. at 1197, that following this holding the Court also expressed doubt that there was an adequate administrative remedy under Illinois law, and said, "[w]hen federal rights are subject to such tenuous protection, prior resort to a state proceeding is not necessary." 373 U.S. at 676 (citations omitted). This statement, however, seems nothing more than an alternative ground of decision, not a dilution of the first holding. Certainly it was so understood by Mr. Justice Harlan, the sole dissenter in *McNeese*, 373 U.S. at 676-82, who expressed as two separate grounds of dissent his views that the doctrine of exhaustion should not be abandoned in that case *and* that Illinois had an available, effective administrative remedy, which should be exhausted before suit was filed under § 1983.

If *McNeese*, as a result of the dual basis of decision, failed to resolve fully the question of prior exhaustion of administrative remedies in § 1983 suits. Damico v. California, 389 U.S. 416 (1967) (per curiam), should have put any remaining doubts to rest. There, the three-judge district court had dismissed a § 1983 complaint for failure to exhaust adequate administrative remedies. In its reversal, the Court cited *McNeese*, with an additional reference to Monroe v. Pape, for the holding that exhaustion of an available administrative remedy is not a prerequisite for an exercise of federal jurisdiction under § 1983. Again, Mr. Justice Harlan dissented, 389 U.S. at 417-20; noting that there could be no question about the adequacy of the state administrative remedy, he concluded that the Court had, in fact, decided the same issue which confronts us.

The next year, the Court again touched on the question before us. In Houghton v. Shafer, 392 U.S. 639 (1968) (per curiam), a district court's dismissal of a prisoner's § 1983 suit was reversed on the dual grounds that the available administrative remedy was not adequate and that exhaustion was not required. *Houghton's* principal importance lies in (a) the fact that it was a § 1983 suit by a state prisoner complaining of allegedly illegal prison restrictions, and (b) the interpretation given it in Wilwording v. Swenson, 404 U.S. 249 (1971) (per curiam). In the latter, the Court reversed the dismissal of applications for state habeas corpus for failure to exhaust administrative remedies. It was held that exhaustion was not required since the efficacy of the remedy was highly doubtful, but that, as another ground of decision, the applications for habeas, since they sought to attack living conditions and disciplinary measures in a penitentiary and not to effect petitioners' release, should be treated as complaints under § 1983. In § 1983 suits, the Court held exhaustion of state remedies was not required, and "[s]tate prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs. Houghton v. Shafer. . . ." 404 U.S. at 251.

Carter v. Stanton, 405 U.S. 669 (1972) (per curiam), and Metcalf v. Swank, 406 U.S. 914 (1972) (mem. op.), are chronologically next in the line of authority. Both were § 1983 suits by welfare recipients. In *Carter*, a judgment dismissing the complaint for failure to exhaust a state administrative remedy was reversed on the ground that exhaustion was not required in this class of cases; and in *Metcalf*, the Court of Appeals was directed to reconsider, in the light of *Carter*, its affirmance (444 F.2d 1353 (7 Cir. 1971)) of the district court's dismissal of the suit for failure to exhaust adequate state administrative remedies.

In Steffel v. Thompson, 415 U.S. 472 (1974), Mr. Justice Brennan, writing for the Court, treated the law as settled in stating that "[w]hen federal claims are premised on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) — as they are here — we have not required exhaustion of

state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights." 415 U.S. at 472-73. Preiser v. Rodriguez, 411 U.S. 475 (1973), may also be significant, not so much for what it did say, but rather for what it did not say. In *Preiser*, the Court apparently had the opportunity to impose an exhaustion requirement on state prisoner suits under § 1983, and this it failed to do. The original Court of Appeals panel decision directed the prisoner, who had sought to redress his loss of good time as a result of prison discipline in a suit under § 1983 but whose suit was treated as a petition for a writ of habeas corpus, to exhaust state administrative or state judicial processes before he pursued further his claim to federal relief. Rodriguez v. McGinnis, 451 F.2d 730, 732-33 (2 Cir. 1971). In the Supreme Court, the case was decided on the basic premise that the complaint was to be treated as an application for a writ of habeas corpus, where exhaustion clearly applied. As Mr. Justice Brennan, in dissent, noted, "the Court does not graft the habeas corpus exhaustion requirement onto prisoner actions under the Ku Klux Klan Act. . . ." 411 U.S. at 503.

From this survey of the pertinent authorities, the law would appear overwhelming that exhaustion of available state administrative remedies is not a prerequisite to maintaining a § 1983 action in a federal court. We recognize, however, that the district courts in the instant cases and in Kochie v. Norton, 343 F.S. 956 (D. Conn. 1972) (dictum), have sought to read these cases to support the conclusion, as expressed in *Kochie*, that "[n]o decision of the Supreme Court squarely holds that the complaint of a state prisoner, which, if well-founded, is capable of prompt and complete redress by an administrative official, can be brought directly into a federal district court under § 1983 without any attempt at exhaustion of administrative remedies." 343 F.S. at 960. Without dissecting their analysis of how the apparent breadth of the language in each of the authorities cited is to be avoided, we are constrained to look at what support, if any, there is to conclude that

the Supreme Court has held, or will hold, that exhaustion in these circumstances will be required.

The only authority suggested by the state, but not vigorously pressed, to support the proposition that exhaustion may be required is Gibson v. Berryhill, 411 U.S. 564 (1973). That was a suit under § 1983 by licensed optometrists to enjoin the conduct of pending proceedings before the Alabama Board of Optometry, the object of which was to revoke their licenses to practice optometry because they practiced their art as employees of other persons or entities. Their principal complaint was that the Board was biased and could not provide them a fair hearing in accordance with the due process clause. A three-judge district court granted an injunction, but it was vacated by the Court and the case remanded for reconsideration in the light of an intervening Alabama Supreme Court case which held that a licensed optometrist was not prohibited by state law from accepting employment from a business corporation.

In reaching this result, the Court considered first the correctness of the district court's decision that it was not required to withhold relief until the license revocation proceedings had been concluded under the normal rule of exhaustion of administrative remedies. Dealing with this subject, the Court said:

> In the instant case the matter of exhaustion of administrative remedies need not detain us long. Normally when a State has instituted administrative proceedings against an individual who then seeks an injunction in federal court, the exhaustion doctrine would require the court to delay action until the administrative phase of the state proceedings is terminated, at least where coverage or liability is contested and administrative expertise, discretion, or factfinding is involved. But this Court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an other-

wise good cause of action under 42 USC § 1983 [42 USCS § 1983]. McNeese v. Board of Education, 373 US 668, 10 L. Ed. 2d 622, 83 S. Ct. 1433 (1963); Damico v. California, 389 US 416, 19 L. Ed. 2d 647, 88 S. Ct. 526 (1967). Whether this is invariably the case even where, as here, a license revocation proceeding has been brought by the State and is pending before one of its own agencies and where the individual charged is to be deprived of nothing until the completion of that proceeding, is a question we need not now decide; . . . (footnote eliminated) 411 U.S. at 574-75.

The Court then concluded, on this point, that since plaintiffs claimed that the administrative proceedings denied them due process of law, so that the remedy was ineffective, adjudication of this claim really required decision of plaintiffs' suit on its merits; therefore, exhaustion would not be required.

The possible significance of the Court's disposition of the exhaustion issue in this manner was pointed up by the separate concurring opinion of Justices Marshall and Brennan in which they joined the Court's opinion "except insofar as it suggests that the question remains open whether plaintiffs in some suits . . . [under § 1983] may have to exhaust administrative remedies." 411 U.S. at 581. They expressed the view that *McNeese, Houghton, Damico* and King v. Smith, 392 U.S. 309 (1968), had settled the question.

We do not think that *Gibson* provides a sufficient precedent to depart from the apparent scope and the literal language of the other Supreme Court cases. The majority opinion recognizes and does not purport to overrule *McNeese* and *Damico*. At most, the statement is a mere introduction to an alternative ground of decision; but, more importantly, it relates to facts quite dissimilar from those in the instant cases. *Gibson* proceeds on the premise that "the individual charged is to be deprived of nothing until the completion of [the state administrative] proceeding" (411 U.S. at 574-5) —

in short, in *Gibson* the possible harm was *in futuro*. *Gibson*, therefore, is unlike the instant cases where the alleged deprivation of civil right has occurred and may be continuing. Although decided before *Gibson*, Whitner v. Davis 410 F.2d 24, 28-29 (9 Cir. 1969), recognizes and supports this distinction, as does Toney v. Reagan, 467 F.2d 953, 956-57 (9 Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973). *See also* Raper v. Lucey, 488 F.2d 748, 751 at n. 3 (1 Cir. 1973); Polk v. State Bar of Texas, 480 F.2d 998, 1003-04 (5 Cir. 1973); Stevenson v. Board of Education, 426 F.2d 1154, 1157 (5 Cir. 1970), *cert. denied*, 400 U.S. 957 (1970). The rationale of this distinction — which we need not adopt or reject to decide the cases before us — is that exhaustion may be necessary only when it assures that a decision of state officials depriving plaintiff of a civil right is final, so that the case is ripe for adjudication.

On balance, therefore, we have repeated expressions by the Supreme Court that exhaustion is not required in cases like the instant ones, and only an indirect expression that exhaustion may be required in certain cases unlike the instant ones. In this state of the law, it is inappropriate to consider the policy considerations which might dictate a different course of decision. They must be addressed to the Supreme Court, which alone can overrule its prior decisions, or to the Congress, which has authority to amend the statute. Our duty is clear: We must follow the Supreme Court, not attempt to lead it. We must hold that exhaustion is not required.

The plaintiffs argue also that the Maryland Inmate Grievance Commission Act does not provide an effective administrative remedy for their claims. They point out, for example, that the Secretary of Public Safety and Correctional Services is apparently neither bound by the record nor the findings and recommendations of the Inmate Grievance Commission in making final disposition of certain grievances, 4A Ann. Code of Md., Art. 41 § 204F(f)(2). An even more glaring omission in the Act, they argue, is its apparent failure to vest the Commission authority to award damages in an approp-

riate case. In the light of our conclusion on the exhaustion issue, however, we need not rule on the efficacy of the plaintiffs' administrative remedy.

Our conclusions require us to reverse in Nos. 74-1456 and 74-1634 and remand these cases for further proceedings. We turn to the merits in Nos. 74-1042 and 74-1043.

II.

McCray's suits against Sergeant Smith, a prison guard at the Maryland Penitentiary, and Captain Burrell, the duty captain in charge of all guards at the Maryland Penitentiary, who described himself as responsible for the entire institution including control and security (but not medical care) of the hospital, arose out of incidents occurring at those institutions on or about November 20, 1971, and January 1, 1972, respectively. The testimony with regard to both incidents was largely conflicting. The district court made extensive findings of fact, resolving questions of credibility, and we accept those findings. We disagree, however, with the legal conclusions to be drawn therefrom. The facts need not be restated in great detail in view of the district court's detailed recitations in its opinion. *See* McCray v. Burrell, 367 F.S. 1191, 1210 *et seq.*

A. *No. 74-1043 — McCray v. Smith*

On or about November 20, 1971, McCray was moved from his regular cell because of his complaints about unsanitary conditions. Sergeant Smith, who had never met McCray before, ordered his removal, had him showered and deloused and placed him in another cell on a different tier. The warden instructed Smith to provide McCray with his law books and legal materials which were kept in his regular cell. When they were not provided to him at once, McCray began a substantial vocal disturbance. Additionally, the screaming McCray tore a locker off the cell wall and banged it repeatedly against the wall.

Sergeant Smith determined that McCray should be removed from this cell and placed in the isolated confinement (I.C.) area, cell No. 5. As found by the district court, "this measure was taken to avoid the possibility of causing a greater disturbance among the other inmates." 367 F.S. at 1211. While McCray was being removed, again, as found by the district court, he "began shouting insults and threatening to do bodily harm to himself." *Id.* Smith, treating these threats as an indication of mental and emotional instability, directed that McCray be placed in isolated confinement without any clothes or bedding. This was done to protect McCray from harming himself.

McCray was placed nude in the cell about 11:30 a.m., November 20. The cell, itself, was quite long and narrow with a high ceiling. The walls, ceiling and floor were all concrete and there was a one-foot high concrete slab, six to eight feet long and three feet wide, which was McCray's bed. Although, initially, McCray was furnished no blankets or other bedding, during the night a prison guard gave him a mattress. McCray testified that it was so cold that he tore open the mattress, which was old and deteriorated, and dug a channel down in the cotton so that he could sleep nestled in the mattress. Subsequently, McCray was disciplined for destroying the mattress.

The cell contained a toilet and a sink. The record does not show whether the cell had a window, but evidence was offered that there was a light bulb recessed in the rear wall. The cell had two doors — the inner one composed of bars, and the outer one made of solid wood but not closed. McCray was given no materials with which to clean himself or the cell, and he was fed in plastic cups. He was deprived of reading and writing materials.

The next morning Sergeant Smith returned to check on McCray and found that he had defecated into a cup and smeared feces over himself and the cell wall. Accordingly, Smith decided not to return him to his former cell. Instead, he had McCray bathed and the cell

scrubbed, and then returned McCray to I.C. Cell No. 5 for another twenty-four hours. It was not until that time that Smith caused notice to be given to a psychologist or psychiatrist in accordance with the applicable written administrative directive which had become effective August 10, 1970. The directive stated that "an inmate who is displaying mentally disturbed behavior may be placed in an isolation cell for the inmate's own safety, or that of the inmate population, until the psychologist/psychistrist is notified . . ." and directed that the *"psychologist/psychiatrist should be contacted immediately after the confinement of the inmate, and the inmate should be evaluated within a twenty-four (24) hour period."* (Emphasis added.) By its terms, the directive permitted the placing of inmates displaying mentally disturbed behavior in a punitive or isolation cell when the institution lacks a mental observation cell and a psychologist or a psychiatrist approves the lodging of such an inmate in an isolation cell.

The next day, November 22, McCray, according to Smith, "started acting alright." He was then returned to his regular cell on the third tier. We infer that McCray's clothes were not returned to him until this time. The record on appeal does not show that he was ever evaluated by a psychologist or a psychiatrist.[2]

B. *No. 74-1042 — McCray v. Burrell*

On or about January 1, 1972, McCray was again removed to another cell. A fire broke out in McCray's cell, according to McCray, accidentally, but in the belief of Captain Burrell, by design. In either event, McCray was burned. Not without difficulty, the guards extinguished the fire and conveyed McCray to the dispensary where, despite McCray's resistance, the nurse on duty treated his burns. The nurse suggested that

[2] Sergeant Smith implied that the psychologist, one Dr. Musk, did see McCray. Dr. Musk testified that he could not report whether he had talked to McCray at this time. He said he would "most probably" have recorded such a visit, but often did not.

McCray remain in a locked cell in the hospital. At a later date, McCray was disciplined for setting fire to his cell.

Captain Burrell, who was present when McCray was treated, not unreasonably believed that McCray had set the fire. Since he concluded that McCray was mentally unstable, he decided, despite the nurse's suggestion, to place McCray in a mental observation (M.O.) cell, again without clothes or a mattress or other bedding. McCray was placed in the M.O. cell at about 9:45 a.m., January 1, and released about 8:00 a.m., January 3. At about the time he was treated in the dispensary, the nurse, purportedly acting in accordance with the written directive to which reference has been made, contacted a physician and informed him that McCray was placed in M.O. The physician told her to communicate with another doctor, whom she was unable to reach, and McCray was not seen by a physician until January 4, 1972.

The M.O. cell in which McCray was placed was described by Captain Burrell as a bare cell. The windows were covered with sheet metal, but the cell had an electric light. The cell had concrete walls, a concrete ceiling, and a tile floor. There was no sink, and the only sanitary facility was an "oriental toilet" — a hole in the floor, six to eight inches across, covered by a removable metal grate which was encrusted with the excrement of previous occupants. The "toilet" flushed automatically once every three to five minutes. McCray was not permitted to bathe, shave or have or use articles of personal hygiene, including toilet paper. He was not afforded reading or writing materials. He claimed that during the forty-six hours he spent in this confinement "it was impossible to sleep . . . I stood up most of that [first] night, the floor was cold."

III.

The district court held that plaintiff's confinement "in both cases for forty-eight hours was not an unreasonable period when one considers the surround-

ing circumstances in each case," 367 F.S. at 1215, and that "the defendant's actions were not excessive exercises of authority beyond the limits of civilized standards of decency . . . they [were not] intended as punishment for the plaintiff's conduct . . . they were employed as precautionary measures . . . the removals . . . to isolated cells were not pointless impositions of suffering . . . there [was not] a less severe alternative that would have achieved the purposes for which the confinement was imposed," 367 F.S. at 1216. While we accept the district court's findings that McCray's confinements in isolated cells were not intended as punishment but for mental observation and as a precaution against a not unreasonable fear that McCray might harm himself, we are constrained to conclude that McCray's eighth amendment right not to be subjected to "cruel and unusual punishments" was violated.

As articulated in Trop v. Dulles, 356 U.S. 86, 100-01 (1958), "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man," therefore the punishment imposed must be justified in light of the "evolving standards of decency that mark the progress of a maturing society." The eighth amendment is, of course, made applicable to the states through the fourteenth amendment. Furman v. Georgia, 408 U.S. 238 (1972); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947).

It may be argued that, if the findings of the district court are accepted, McCray's claims do not raise eighth amendment questions, because McCray was isolated not for purposes of punishment but for the more humane and not unreasonable purpose of protecting him from self-harm, until an expert evaluation of his mental condition could be made and proper therapeutic steps taken if they were indicated. But the answer is that isolation of McCray occurred within a prison context. His jailers had the power to isolate him because he had been committed to their custody as punishment imposed pursuant to a judicial determination that he had engaged in criminal conduct. His confinement, in whole and in part, was punishment for his misdeeds. Thus, all of his confinement was subject to the restrictions of the eighth amendment. *Cf.* Howard v. Smyth, 365 F.2d 428, 429-30 (4 Cir. 1966), *cert. denied* 385 U.S. 988 (1966). If anything, the fact that McCray was isolated within the prison for nonpunitive purposes strengthens his case because special disciplinary reasons may not be offered in possible justification for the conditions in which he was kept.

A. In McCray's suit against Smith, we think that a violation of the eighth amendment has been shown.[3] The conditions of confinement in I.C. cell No. 5 came perilously close to a denial of eighth amendment rights in and of themselves, but the record is not sufficiently complete that we rest our decision on this ground. The cell did contain a toilet and a sink, although we do not know if either could be operated by McCray from within the cell or whether a guard was available to render them operative where their use was indicated. McCray was deprived of essential articles of hygiene, although conceivably there could have been a good faith belief that he might harm himself if permitted access to such seemingly innocuous articles as a bar of soap or a toothbrush. McCray was also deprived of heat, clothes

[3] We perceive that two tests for violations of the eighth amendment are relevant in the cases before us. First, are the conditions of punishment sufficiently "shocking" that they amount to "cruel and unusual" punishment? *See, e.g.*, Landman v. Royster, 354 F.S. 1302, 1318 (E.D. Va. 1973). Second, does the punishment constitute some rational means to reach a permissible end or is it, instead, arbitrary, Howard v. Smyth, 365 F.2d 428, 431 (4 Cir. 1966), unreasonable, Almond v. Kent, 459 F.2d 200, 204 (4 Cir. 1972), or unnecessary, Weems v. United States, 217 U.S. 349, 370 (1910)? The district court phrased this second test as requiring that there not be "a less severe alternative that would have achieved the purposes for which the confinement was imposed," 367 F.S. at 1216, and its phraseology does not seem inaccurate to us. *See also* Landman v. Royster, 333 F.S. 621, 645 (E.D. Va. 1971).

and blankets, and he was furnished only a deteriorated mattress in which he scooped out a resting place for himself. The record, however, does not disclose the temperature in McCray's cell or whether McCray was able to capture adequate sleep under these primitive conditions.

What is clear, however, is that if McCray's mental condition was reasonably believed to be so suspect as to justify the conditions we have described, then it was such as to warrant, if not the actual ministrations of professional personnel, an immediate effort to gain him prompt medical evaluation and necessary treatment. The written directive for operation of the place of confinement states specifically that when an "inmate who is displaying mentally disturbed behavior" is "placed in an isolation cell for the inmate's own safety, or that of the inmate population," the "psychologist/psychiatrist should be contacted *immediately* after confinement of the inmate, and the inmate should be evaluated within a twenty-four (24) hour period" (emphasis added). Evidently McCray was never examined during this confinement, but Sgt. Smith can hardly be held as a guarantor that the psychologist/psychiatrist whom he does not command will carry out his duties under the directive. Sgt. Smith, however, is accountable for his duty to notify, or to cause to be notified, the psychologist/psychiatrist *immediately* after McCray's isolation. By his own admission, Smith did not seek expert professional help until nearly twenty-four hours after he isolated and stripped McCray.

On this record, we conclude that McCray's conditions of confinement *per se* do not mount up to a denial of his rights under the eighth amendment. We have no doubt that a prisoner evidencing mental derangement in a form suggestive of self-harm or harm to others may and should be removed from the general prison population until his true condition can be assayed by those competent to evaluate him; and, until his examination and the formulation of an expert opinion, he may be

subjected to protective measures. In permitting such confinements, the prison directive comports with the eighth amendment. But, when the protective measures take the form of isolation, nude, in I.C. cell No. 5, we believe also that the administrative directive states the constitutional minimum in requiring that a "psychologist/psychiatrist . . . be contacted immediately after the confinement of the inmate, and the inmate . . . evaluated within a twenty-four (24) hour period." If compliance with the directive is not forthcoming, the guarantee of the eighth amendment has been denied, and, as we shall presently hold, if expert medical help is not forthcoming within a reasonable period of time, the deprivations, discomforts and suffering resulting from such confinement must be alleviated and less barbarous means of protection must be provided.

B. In McCray's suit against Burrell, we perceive two violations of the eighth amendment. First, the record reveals that the conditions of confinement in the mental observation (M.O.) cell in which McCray was kept fall far short of the current standards of decency of present-day society. McCray was kept naked in a barren cell without blanket or mattress and with nowhere to sit, lie or lean except against bare concrete or bare tile. He had no sink or running water; his only toilet was a hole in the floor, the cover of which was encrusted with human excrement. He was denied all articles of personal hygiene.[4] Society would hardly tolerate such confinement for a suspected mental patient, not convicted of crime; we cannot conceive that

[4] Many other cases have singled out the deprivations suffered by McCray in overall holdings that cell conditions violate the eighth amendment: unsanitary cell conditions and lack of items with which to clean oneself, LaReau v. MacDougall, 473 F.2d 974, 978 (2 Cir. 1972), *cert. denied*, 414 U.S. 878 (1973); inadequate heat, Wright v. McMann, 460 F.2d 126, 129 (2 Cir. 1972); Landman v. Peyton, 370 F.2d 135 (4 Cir. 1966); two and one-half days of isolated confinement, Knuckles v. Prasse, 302 F.S. 1036, 1062 (E.D. Pa. 1969), aff'd per curiam, 435 F.2d 1255 (3 Cir. 1970), *cert. denied*, 403 U.S. 936 (1971), *reh. denied*, 404 U.S. 877 (1971).

decent society would tolerate it even for a suspected mental patient who had been convicted of crime. The conditions of this confinement constitute a *per se* violation of the eighth amendment. *See* Landman v. Royster, 354 F.S. 1302 (E.D. Va. 1973); Landman v. Royster, 333 F.S. 621 (E.D. Va. 1971).

The second violation is identical to the violation in McCray's case against Smith — noncompliance with the constitutionally minimum requirements of the written directive concerning isolation of mentally disturbed inmates. As found by the district court, Captain Burrell took steps to comply with the institution's written directive to obtain promptly the services of an expert to evaluate McCray's condition at or about the time that he ordered McCray's special confinement. Like Sergeant Smith, Captain Burrell was not a guarantor that the expert attention would be immediately forthcoming, and it may well be that, as suggested by the district court, the directive was not fully carried out because McCray's second confinement occurred over the New Year's Day holiday. But Captain Burrell was not just a prison guard; he was captain of the guards. Even if we assume that the conditions of isolated confinement were constitutionally permissible, it was incumbent on Captain Burrell, if expert medical attention was not forthcoming in a reasonable period of time, to devise and employ means to protect McCray from injury to himself other than continued isolation with deprivation of clothing and elements of personal hygiene.

Although in the McCray cases we conclude that the treatment afforded McCray amounted to a denial of his rights under the eighth amendment, it does not necessarily follow that McCray is entitled to damages and injunctive relief against Smith or that he is entitled to an award of damages against Burrell. The district court held that "since the defendants, as shown from all the facts, acted in good faith in exercising their discretion . . . they are immune from suit under 42

U.S.C. § 1983." 367 F.S. at 1217. Although the cases must be remanded, we do not foreclose the possibility that both Smith and Burrell may again be held immune from damages.

Our prior decisions establish that when a prison guard acts in reliance on a good faith belief that what he is doing is constitutionally permissible, he is immune to damages as a consequence of his action even if it should be later established that his belief was ill-founded. Skinner v. Spellman, 480 F.2d 539 (4 Cir. 1973). *Cf.* Eslinger v. Thomas, 476 F.2d 225 (4 Cir. 1973); Hill v. Rowland, 474 F.2d 1374 (4 Cir. 1973). In applying the test, however, the district court seemed to conclude that because the defendants appeared to have complied with both the substance of the written directive with regard to the isolation of prisoners suspected of mental illness and the "normal operating procedure" of removing the clothing of "a prisoner who had exhibited an unstable mental and emotional state," 367 F.S. at 1217, immunity to damages followed as a matter of course. We do not perceive that the immunity doctrine may be applied in this fashion. Additional findings must be made before it may be properly concluded that defendants are immune, and it may be necessary to adduce additional evidence for those findings to be made.

Most important, defendants may not avail themselves of the defense until they have proved that they had a good faith belief in the legality of what they did. Since what is sought to be proved is a matter of defense, the burden of proof is upon them. In order to sustain that burden, we perceive certain subsidiary facts that must be established.

A. In the case of Smith, first, a satisfactory explanation must be offered of his directions that McCray be isolated in the I.C. area, rather than an M.O. cell. It is true that the written directive permitted a disturbed prisoner to be isolated in an I.C. cell in an institution which was lacking M.O. facilities, but it appears that

McCray's subsequent isolation by Burrell was in an M.O. cell, albeit one more primitive than the I.C. cell in which Smith placed McCray, so that it can be inferred that the Maryland penitentiary was not an institution lacking in M.O. facilities.

Second, the written directive, purportedly followed by Smith, explicitly stated that the "psychologist/psychiatrist should be contacted *immediately* after confinement of the inmate, and the inmate should be evaluated within a twenty-four (24) hour period" (emphasis added). As we have said, Smith cannot be held to the requirement of evaluation within twenty-four hours, but this provision gives meaning to the use of the word "immediately" in the preceding clause, and the record is clear that Smith took no steps to notify a psychologist or psychiatrist until the initial twenty-four hours of confinement had almost expired. In order to avail himself of the defense, it will therefore be incumbent on Smith to present proof which establishes by a preponderance of the evidence that the time within which he gave the notice complied with his reasonable understanding of the administrative direction of "immediately."[5] In this connection, the district court found that prison procedures required Smith to notify his superior immediately after isolating an inmate and that Smith was not shown to have failed to notify his superior. The district court misplaced the burden of proof. The immunity defense is for Smith to prove, not McCray to disprove.

B. In Burrell's case, we have held that the conditions of the M.O. cell in which McCray was confined were *per se* such as to violate the eighth amendment. But this is

[5] On remand the evidence may show that Smith discharged his duty by notifying a superior whom he reasonably expected would properly notify a psychologist or psychiatrist. Indeed, it may even appear that the superior gave such notice. In either event, if the proof further shows that standard operating procedures of the prison permitted this form of notification as compliance with the administrative directive, Smith could still be immunized from liability by the defense.

not to say that if Burrell had a good faith belief that he was acting legally in placing McCray in the M.O. cell, he was liable for damages for this violation. However, Burrell's good faith in this regard remains to be established if liability is to be avoided.

We have also held that the eighth amendment was violated when the administrative directive was not followed. But Burrell may not be responsible for this noncompliance. The district court must examine the scope of Burrell's duties and the extent of his responsibilities and determine that they were fully met before liability may be excused. This will include a consideration of the following, among others: Did Burrell have a continuing duty toward McCray after placing him in an M.O. cell? If so, did he have a duty to determine that a psychiatrist or psychologist had in fact been summoned? What duty, if any, did Burrell have when a psychiatrist or a psychologist failed to respond in a reasonable period? Were there other, more humane facilities to which McCray could have been transferred when a psychiatrist or psychologist failed to respond?

V.

Finally, we consider McCray's contention that he was improperly denied a jury trial in his suits against Smith and Burrell. We perceive no error.

McCray made no demand for a jury trial when he filed his *pro se* complaints on January 19, 1972, and February 9, 1972, in No. 74-1042, and on March 7, 1972, in No. 74-1043. Counsel was appointed to represent him in March 1972 and substitute counsel was appointed on or about December 8, 1972. The first request by McCray for a jury trial was made orally in open court on June 11, 1973.

McCray's request was both untimely and not in writing as required by Rule 38(b), F.R. Civ. P. As such, it constituted a waiver of trial by jury, Rule 38(d). Of course the district court had discretion to grant the

request, in whole or in part, notwithstanding, Rule 39(b), but we cannot say that there were such exceptional circumstances that the failure to grant the oral motion was an abuse of discretion. General Tire & Rubber Co. v. Watkins, 331 F.2d 192, 197-98 (4 Cir. 1964), *cert. denied*, 377 U.S. 952 (1964).

Accordingly, in Nos. 74-1042 and 74-1043, we reverse the judgments of the district court and remand the cases for further proceedings in accordance with the views expressed herein.

Reversed and remanded.

Addendum

Since the preparation of the majority opinion, the Supreme Court has decided Wood v. Strickland, ___ U.S. ___ (February 25, 1975), a case having relevance to Part IV of our opinion dealing with the defense of official immunity. *Wood* concerned the immunity of school officials to suits for damages under 42 U.S.C. § 1983 brought by students who claimed that they had been disciplined in violation of their constitutional rights. The holding that school officials are entitled to qualified immunity proceeded as an extension and application of Tenney v. Brandhove, 341 U.S. 367 (1951); Pierson v. Ray, 386 U.S. 547 (1967); and Scheuer v. Rhodes, 416 U.S. 232 (1974). The conditions under which immunity could be properly invoked were described as follows:

> The official must himself be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. To be

> entitled to a special exemption from the categorical remedial language of § 1983 . . . a school board member . . . must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. . . . [A] school board member is not immune for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with malicious intention to cause a deprivation of constitutional rights or other injury to the student. . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith. ___ U.S. at ___.

We think that what is said on the subject in the main opinion is consistent with *Wood*, and that *Wood* constitutes additional authority for the conclusions reached therein.

Field, Circuit Judge, concurring and dissenting:

While I cannot quarrel with the conclusion of the majority that on the present state of the law we have no alternative but to hold that exhaustion may not be required in a suit under 42 U.S.C. § 1983, in all deference, I cannot agree with its reversal of the district court on the merits of McCray's cases. To my mind this action of the majority is an incredible and unjustified judicial intrusion upon the right of the Maryland authorities to take reasonable disciplinary measures to maintain some semblance of order in their penal institutions, and arbitrarily discards the well docu-

mented decision of the district judge which was reached after a full and complete evidentiary hearing.[1]

It occurs to me that far from intruding upon the Eighth Amendment rights of McCray, Smith and Burrell conducted themselves in a reasonable manner and with admirable restraint under the circumstances. As the majority notes, the genesis of the Smith incident was McCray's request that he be moved from his regular cell because of its unsanitary condition. Sergeant Smith acceded to the request and had McCray showered and deloused and placed in another cell. When Smith did not immediately comply with McCray's imperious demand that his law books and legal materials be brought to his new cell, McCray created a substantial disturbance, screaming and tearing a locker off the wall and banging it repeatedly against the cell wall. It was then that Smith decided to remove McCray from the South Wing and place him in the isolated cell area, and the district judge specifically found that "[c]learly this measure was taken to avoid the possibility of causing a greater disturbance among the other inmates." Assuredly, this was not an unreasonable step on Smith's part nor was his

[1] The majority cites this court's opinion in Landman v. Peyton, 370 F.2d 135 (1966). In that case which involved the solitary confinement conditions in the Virginia State Penitentiary, the evidentiary hearing conducted by the district court disclosed, among other things, that the prisoners in such confinement subsisted on a diet of bread and water for two days, were deprived of all items for personal hygiene, and that the authorities resorted to the use of tear gas twelve to fifteen times in the course of a year. The district court concluded that all of this was done in the legitimate exercise of disciplinary authority. Writing for this court, Judge Sobeloff was highly critical of the Virginia authorities. However, he concluded that since the case came to us on conflicting testimony, we were not prepared to say that the findings of the district judge were clearly erroneous. It occurs to me that the findings and conclusions of Judge Northrop in the present case should be accorded similar respect.

decision to strip McCray and remove the mattress from the I.C. cell unreasonable in the light of McCray's shouted threats to do bodily harm to himself. On the following morning when Smith discovered that McCray had smeared himself and his cell with his own fecal matter, Smith did not leave him in this deplorable condition but dutifully had McCray showered and the cell scrubbed before returning him to the cell for another twenty-four hours. Under the circumstances, I hardly see how this or any other court could conclude that McCray had been treated in such a "base, inhuman and barbaric" manner that it violated his Eighth Amendment rights.[2]

In the Burrell case McCray had set his cell on fire, intentionally or otherwise, and thereafter used a metal cabinet to first break the sink and then the toilet in what the district court characterized as an "alleged effort to allow the water to flow more freely." The guards extinguished the fire and took McCray to the dispensary where his burns were treated by a nurse despite McCray's abusive resistance. Burrell, not unreasonably, viewed McCray's conduct as evidence of mental instability and, accordingly, placed him in a mental observation cell after removing his clothes and mattress to protect him from possible self-injury. As stated by the majority, McCray was allowed to remain in the M.O. cell for approximately forty-eight hours before being returned to his regular cell.

[2] With respect to the cell conditions the district court made the following observation:

> "The physical aspects of the cells in the isolated cell area and the mental observation area (which are substantially the same) are primitive at best. However, it is significant that the plaintiff candidly admitted on several occasions he had requested to be placed in the I.C. area because it was more conducive to preparation of legal papers. While it is true that he was fully clothed on these latter visits to I.C., it does indicate that the conditions of the cells were not intolerable." 367 F. Supp. at 1216.

Upon the evidence relative to these two incidents the district court specifically concluded that McCray had been placed in isolation "to avoid the possibility of continued disruptions that might involve substantial portions of the South Wing." The court further stated:

> "It is important to bear in mind that the Maryland Correctional System, like many others, has been plagued by considerable prisoner unrest. While this Court is not absolving the prisons of all responsibility for this problem, it is clear that a prison correctional officer must be concerned with avoiding situations which could ignite a riot. *This was the principal factor considered by the defendants in placing the plaintiff in an isolated cell.*" (Emphasis added) 367 F. Supp. at 1213-1214.

The district judge found that none of these events constituted an arbitrary and capricious punishment of McCray, and the majority concedes that he applied the appropriate criteria to the evidence when he observed:

> "The Court concludes that the defendants' actions were not excessive exercises of authority beyond the limits of civilized standards of decency. *See* Trop v. Dulles, 356 U.S. 86, 100-101. 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958). Nor were they intended as punishment for the plaintiff's conduct, cut as has been repeatedly stated, they were employed as precautionary measures. The removals of the plaintiff from his cell on the South Wing to isolated cells were not pointless impositions of suffering, nor was there a less severe alternative that would have achieved the purposes for which the confinement was imposed. Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 2747, 33 L. Ed. 2d 346 (1972)." 367 F. Supp. at 1216.

To bolster its position in both cases, however, the majority has seized upon an institutional directive which stated that "an inmate who is displaying mentally disturbed behavior may be placed in an isolation cell for the inmate's own safety, or that of the

inmate population, until the psychologist/psychiatrist is notified * * *" and directed that the psychologist/psychiatrist should be contacted immediately after the confinement of the inmate, and the inmate should be evaluated within a twenty-four (24) hour period." Since, to some degree at least, the treatment accorded McCray was based upon the apprehension that he might be mentally disturbed, the majority concludes that the failure of Smith and Burrell to call expert medical help within the period prescribed by the directive in itself violated McCray's Eighth Amendment rights, and states that "if expert medical help is not forthcoming within a reasonable period of time, the deprivation, discomforts and suffering resulting from such confinement must be alleviated and less barbarous means of protection must be provided."

First of all, this somewhat novel constitutional pronouncement utterly ignores the finding of the district judge that the *principal* reason for McCray's isolation was to insulate the other inmates of the South Wing from the potentially dangerous and disruptive consequences of McCray's outrageous and flagrant misconduct, including what the district judge found was his attempt "to burn his cell and possibly the entire South Wing." Concededly, an agency must comply with its own regulations,[3] and had McCray sustained any injury as a result of the failure to provide timely medical care, arguably the directive might have furnished a basis for a negligence action by him.[4] The fact is, however, he required no such medical attention, and I am unaware of any constitutional principle which requires or justifies the incorporation of such an institutional directive into the Bill of Rights.

We are not dealing here with the arbitrary and pervasive pattern of conduct which Judge Merhige found in the Virginia penal system, *Landman v. Royster*, 354 F. Supp. 1302 (E.D. Va. 1973); *Landman v.*

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[3] *See*, United States v. Heffner, 420 F.2d 809 (4 Cir. 1969).

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[4] *See* Church v. Hegstrom, 416 F.2d 449 (2 Cir. 1969).

Royster, 333 F. Supp. 621 (E.D. Va. 1971); nor are the facts of this case at all similar to the prolonged confinement in the "strip cells" of Dannemora which confronted the Second Circuit in *Wright v. McMann*, 387 F.2d 519 (1967). There is not even a suggestion that McCray was being arbitrarily punished for attempting to exercise any of his constitutional rights, *cf. Howard v. Smyth*, 365 F.2d 428 (4 Cir. 1966). Regrettably, it appears to me that when the decision of the majority is read in the light of the record in this case, it is tantamount to a declaration that in this circuit the Eighth Amendment proscribes any substantial disciplinary action by prison authorities no matter how extreme and disruptive the misconduct of the inmate may be. In my opinion we would better serve the interests of justice and orderly prison administration by heeding the admonition of Judge Kaufman in *Sostre v. McGinnis*, 442 F.2d 178, 190-191 (2 Cir. 1971):

> "For a federal court, however, to place a punishment beyond the power of a state to impose on an inmate is a drastic interference with the state's free political and administrative processes. It is not only that we, trained as judges, lack expertise in prison administration. Even a lifetime of study in prison administration and several advanced degrees in the field would not qualify us *as a federal court* to command state officials to shun a policy that they have decided is suitable because to us the choice may seem unsound or *personally* repugnant." (Emphasis in original.)

McCray is no stranger to the district court of Maryland, having filed thirty-six suits in that forum in the three years prior to the cases here in question. Additionally, the records of our clerk reflect that fourteen appeals by McCray have been placed on the regular docket of this court during the past three years. The only conclusion that can reasonably be drawn from McCray's litigious history is that he is a chronic troublemaker and malcontent who is engaged "in a ceaseless barrage of frivolous civil suits at public

expense based upon allegations that have been repeatedly found meritless." *Daye v. Bounds*, (No. 74-1374, January 16, 1975, Slip. Op. p. 7). We can rest assured that if it accomplishes nothing else, the decision of the majority in these cases will encourage McCray and other prisoners of a similar disposition to flaunt prison authority, continue their disruptive conduct in the institution, and clog the docket of the district court with more frivolous litigation. In a prefatory observation in his opinion in these cases Judge Northrop noted that almost 31% of prisoner appeals filed nationwide were filed in the Fourth Circuit in fiscal 1972 and that this percentage increased to 36.1% during the first half of 1973. More importantly, he noted, such cases accounted for 38% of all cases filed with the Fourth Circuit in 1972 and for 45.3% for the first half of 1973. I discern something more than a mere coincidental correlation between these disturbing statistics and the philosophy of judicial lenity evidenced by the majority in these cases of McCray.

Judge Russell authorizes me to say that he joins in this opinion.

WIDENER, Circuit Judge, concurring and dissenting:

With deference to the majority, I agree with the opinion of Judge Field and I would add a few words.

I.

Although the majority opinion recites that it accepts the findings of fact of the district judge, it promptly discards the inferences made by him which are as much a part of his findings as the naked facts themselves. This I do not believe an appellate court has the authority to do, much less ought to do. FRCP 52(a); *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960); *United States v. Gypsum Company*, 333 U.S. 364, 394-95 (1948); *Piedmont Minerals Company v. United States*, 429 F.2d 560, 562 (4th Cir. 1970); *Glasscock v. United States*, 323 F.2d 589 (4th Cir. 1963); *Wilsey-Bennett Trucking Company v. Frost*, 275 F.2d 144, 147 (10th Cir. 1960).

II.

With respect to the question of exhaustion of administrative remedies, I concur in the result solely because of Part II of *Wilwording v. Swenson*, 404 U.S. 249 (1971), and not for the reasons given by the majority.

As the majority properly recognizes, *Monroe* dealt with state judicial, and not administrative, remedies. In *McNeese*, there was an administrative procedure but no real administrative remedy. As the court stated, "The Superintendent himself apparently has no power to order corrective action. In other words, his 'only function . . . is to investigate, recommend, and report. . . . [He] can give no remedy. . . .'" 373 U.S. at 675.

In *Damico*, the court apparently moved away from the more narrow ruling of *McNeese* and construed that case to hold that administrative remedies in suits under 42 U.S.C. § 1983 need not be exhausted although adequate. This ruling was underscored by *Houghton*, a prisoner's case in which the prisoner sought legal materials. The court noted, however, that it seemed likely that the administrative remedy was futile, and then, in an alternative holding, stated that resort to administrative remedies was unnecessary. 392 U.S. at 640. The matter stood here at the time of *Wilwording v. Swenson*, another prisoner's case challenging living conditions and disciplinary measures in 1971. Part II of that opinion took up the question of exhaustion in a prisoner's case brought under § 1983, and the court reaffirmed its holding in *Houghton* that in any event resort to administrative remedies was unnecessary. 404 U.S. 252.

But the *Houghton* decision was based on the reasoning that "state prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." 404 U.S. at 251. And the opinion noted the "probable futility" of administrative remedies in *Houghton*, 404 U.S. at 252.

Wolfe v. McDonnell, 42 L.W. 5190 (1974), however, held, rather than recited, that the rights of a state prisoner under § 1983 are not coextensive with those of any other person, and the court stated: "Of course, as we have indicated, that a prisoner retains rights under the due process clause in no way implies that this right is not subject to restrictions imposed by the nature of the regime to which he has been lawfully committed. . . . (citations omitted). Prisoner disciplinary proceedings are not part of a criminal prosecution and the full panoply of rights due a defendant in such proceedings does not apply. . . . (citations omitted). In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." 42 L.W. at 5195, 5196. The rule, as pointed out in the dissenting opinions, created a separate class for prisoners.

Further erosion of the absolute rule which some consider to have existed is shown by the concurring opinion of Mr. Justice Marshall in *Gibson v. Berryhill*, 411 U.S. 564 (1974), in which he stated that he joined the opinion of the court "except insofar as the suggestions that the question remains open whether plaintiffs in some suits brought under 42 U.S.C. § 1983 may have to exhaust administrative remedies." 411 U.S. at 581. *Gibson* was a suit under 42 U.S.C. § 1983 concerning the practice of optometry in Alabama, and the opinion of the court stated that whether exhaustion of administrative remedies in such a matter was "invariably the case" "is a question we need not now decide." 411 U.S. at 574, 575.

Thus, *Gibson v. Berryhill* may be read to *hold* that the question of exhaustion of administrative remedies is at least a partially open question.

Further erosion of the exhaustion rule is found in the very recent case of *Huffman v. Pursue*, 43 L.W. 4379 (March 18, 1975). That case held, in a suit brought in a district court to enjoin a common nuisance proceeding in a State court, where judgment had been entered in

the State court but the losing party had not appealed in the State system, rather going directly to the federal district court, that "a party in appellees posture must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself in one of the exceptions specified in *Younger.*" 43 L.W. at 4384. The importance of the ruling is that it shows definitely that the all embracing rule of non-exhaustion in all § 1983 cases is no longer the law, for this, and the holding in *Wolfe*, are direct holdings that, first, prisoners' rights are special cases, and, second, exhaustion may be required in some circumstances although the basis of the suit is under 42 U.S.C. § 1983. Indeed, the dissent of Mr. Justice Brennan in *Hoffman* describes the majority ruling as "an obvious first step toward discard of heretofore settled law that such actions may be maintained without first exhausting state judicial remedies." 43 L.W. at 4386.

Although not decided under 42 U.S.C. § 1983, *Schlesinger v. Councilman*, 43 L.W. 4432 (March 25, 1975), has further eroded the all embracing rule. It held that where a serviceman is charged with crimes by military authorities and could "show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention by way of injunction or otherwise." 43 L.W. at 4438, 4439. And the court concluded ". . . we discern nothing that outweighs the strong consideration favoring exhaustion of remedies or that warrants intruding on the integrity of military court processes." 43 L.W. at 4439. At p. 4438, the court had compared the policy rules of exhaustion in habeas corpus and non-intervention in State criminal proceedings with exhaustion of administrative remedies.

To this date, the Court has not been faced with a fact situation similar to the one at hand, that is to say, with a state statute providing an administrative remedy which, if not entirely adequate, is so nearly so that the deferral of only a small part of the relief sought would

not impinge on the rights of the plaintiff in any significant manner.

There is assuredly no policy reason for the courts not to apply the customary and general law of requiring exhaustion of administrative remedies merely because a case is brought under 42 U.S.C. § 1983. This is conclusively shown by the exhaustion doctrine developed with reference to habeas corpus cases. Surely, liberty is our most precious right, all others paling into insignificance beside it. And the protection of liberty in the last analysis is by writ of habeas corpus, which is specifically recognized in the Constitution and there protected from suspension except when in cases of rebellion or invasion the public safety may require it. *U. S. Constitution*, Article II, § 9. In the face of the liberty interest protected, for the sovereign in the last analysis may only impose his will on the citizen by confinement, the courts nevertheless developed an exhaustion requirement in habeas corpus cases as early as 1886 in *Ex parte Royall*, 117 U.S. 241 (1886), which was followed by a series of cases as late as *Ex parte Hawk*, 321 U.S. 144 (1944). The exhaustion doctrine was then codified in 1948 in 28 U.S.C. § 2254. Since no policy reason exists against exhaustion in protecting the liberty interest as shown by the decisions of the Supreme Court, I can find no policy interest which exists against an exhaustion requirement respecting conditions of confinement. If exhaustion is required to test the legality of the fact of confinement, what policy should require non-exhaustion when testing the conditions of confinement?

It follows that I would affirm other than on account of that part of Part II of *Wilwording* which has not been modified.

Judge Russell authorizes me to say that he joins in this opinion.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

ANNOTATED CODE OF MARYLAND

Article 41

§ 204F. Inmate Grievance Commission.

(a) *Commission established; appointment and terms of members; chairman; vacancies; compensation.* – The Inmate Grievance Commission is established as a

separate agency within the Department of Public Safety and Correctional Services. It shall consist of five members appointed by the Governor with the advice of the Secretary of Public Safety and Correctional Services. Of the five members so appointed, not less than two shall be lawyers qualified to practice law in the State of Maryland and not less than two members shall be persons of knowledge and experience in one or more of the fields under the jurisdiction of the Department of Public Safety and Correctional Services. Of the members initially appointed, two shall be for a term of four years, one shall be for a term of three years, one shall be for a term of two years and one shall be for a term of one year. Thereafter, all reappointments shall be for terms of four years. The Governor, with the advice of the Secretary of Public Safety and Correctional Services shall designate the chairman from time to time. The Governor, with the advice of the Secretary of Public Safety and Correctional Services, shall fill any vacancy which occurs before the expiration of a term for the balance of the term so remaining. Each member of the Commission shall receive per diem compensation as provided in the budget for each day actually engaged in the discharge of his official duties as well as reimbursement for all necessary and proper expenses.

(b) *Appointment and salary of executive director; investigative, secretarial and clerical employees.*—The Secretary of Public Safety and Correctional Services, with advice of the Commission, and with the approval of the Governor, shall appoint an executive director of the Commission who shall serve at the pleasure of the Secretary and who shall receive such salary as provided in the budget. In addition, the Secretary may provide the Commission with such investigative, secretarial and clerical employees as may be necessary for the efficient administration of the powers and duties of the Commission and as provided in the budget.

(c) *Removal of members.*—The Governor, upon the recommendation of the majority of the Commission or upon the recommendation of the Secretary, may remove

any member of the Commission for one or more of the following:

(1) Conviction of a crime involving moral turpitude or of any criminal offense the effect of which is to prevent or interfere with the performance of Commission duties.

(2) Failure to regularly attend meetings of the Commission.

(3) Failure to carry out duties assigned by the Commission or its chairman.

(4) Acceptance of another office or the conduct of other business conflicting with or tending to conflict with the performance of Commission duties.

(5) Any other ground which, under law, necessitates or justifies the removal of a State employee.

(d) *Submission of grievance or complaint.*—Any person confined to an institution within the Division of Correction, or otherwise in the custody of the Commissioner of Correction, or confined to the Patuxent Institution, who has any grievance or complaint against any officals or employees of the Division of Correction or the Patuxent Institution, may submit such grievance or complaint to the Inmate Grievance Commission within such time and in such manner as prescribed by regulations promulgated by the Commission. If, and to the extent that, the Division of Correction or the Patuxent Institution has a grievance or complaint procedure applicable to an inmate's particular grievance or complaint, and if the Inmate Grievance Commission deems such procedure reasonable and fair, the Commission may by regulations require that such procedure be exhausted prior to the submission of the grievance or complaint to the Commission.

(e) *Preliminary review.*—When a grievance or complaint is submitted to the Inmate Grievance Committee, the Commission, or any member thereof or the executive director, if so provided by the Commission's regulations, shall preliminarily review the grievance or

complaint. If upon such preliminary review the grievance or complaint is determined to be on its face wholly lacking in merit, it may be dismissed, by the reviewing commissioners or commissioner or executive director as the case may be, without a hearing or without specific findings of fact. Such order of dismissal shall be forwarded to the complainant within 60 days after submission of the grievance or complaint and shall constitute the final decision of the Secretary of Public Safety and Correctional Services for purposes of any judicial review.

(f) *Hearing and disposition by Commission; review by Secretary of Public Safety and Correctional Services.*—Whenever, after the preliminary review provided for the subsection (e), a grievance or complaint is not found to be on its face wholly lacking in merit, the Commission shall as promptly as practicable hold a hearing on the grievance or complaint. At least three members of the Commission shall sit at any hearing, and decisions shall be by a majority of those sitting. A record of the testimony presented at the hearing shall be kept according to the rules and regulations promulgated by the Commission. The Commission's decision shall be issued promptly after the hearing in the form of an order which shall include a statement of the findings of fact, the Commission's conclusions and its disposition of the complaint. The types of disposition shall be as follows:

(1) If after the hearing, the Commission finds in its order that the complaint is wholly lacking in merit and should be dismissed, such an order of dismissal shall be promptly forwarded to the complainant and shall constitute the final decision of the Secretary of Public Safety and Correctional Services for purposes of any judicial review.

(2) However, if after the hearing, the Commission in its order finds that the inmate's complaint was in whole or in part meritorious, such order shall be promptly forwarded to the Secretary of Public Safety and Correctional Services. Within fifteen days of the receipt of such an order, the Secretary by order shall affirm the

order of the Commission, or shall reverse or modify the order where he disagrees with the findings and conclusions of the Commission. The Secretary shall order that the appropriate official of the institution in question accept in whole or in part the recommendation of the Commission or the Secretary may take whatever action he deems appropriate in light of the Commission's findings. The order of the Secretary shall be promptly forwarded to the complainant, and the Secretary's order shall constitute the final decision for purposes of judicial review.

(g) *Access to documentary evidence; subpoenas; oaths and affirmations.*—The Commission, with the approval of the Secretary of Public Safety and Correctional Services, shall at all reasonable times have access to, for the purposes of examination, and the right to copy, any documentary evidence of any person or instituion being investigated or proceeded against and may require by subpoena the attendance and testimony of witnesses and the production of all documentary evidence of any person relating to any matter under investigation. The presiding commissioner at a hearing may administer oaths and affirmations.

(h) *Right of inmate to appear before Commission; opportunity to call witnesses; representation by counsel.* — The inmate shall have the right to appear before the Commission and shall have the opportunity to call a witness or a reasonable number of witnesses depending upon the circumstances and the nature of the complaint, subject to the discretion of the Commission as to the relevancy of the testimony and questions and the number of witnesses sought to be called. The inmate shall have a reasonable opportunity to question any witnesses who testify before the Commission. Such rights of the inmate shall not be unreasonably withheld or restricted by the Commission. If the inmate requests that he be represented at the hearing by an attorney of his own choosing he shall be permitted such representation at his own expense.

(i) *Record of complaints.* — A record shall be kept of all complaints and their disposition which shall be open to public inspection during regular business hours.

(j) *Conduct of hearings at certain institutions.* — For the performance of its duties, the Commission may conduct hearings at the institutions under the supervision and control of the Division of Correction or at the Patuxent Institution.

(k) *Rules and regulations.* — The Commission, subject to the approval of the Secretary, shall have the power to adopt rules and regulations for the conduct of its proceeding as provided for in this section.

(l) *Judicial review.* — No court shall be required to entertain an inmate's grievance or complaint within the jurisdiction of the Inmate Grievance Commission unless and until the complainant has exhausted the remedies as provided in this section. Upon the final decision of the Secretary of Public Safety and Correctional Services, the complainant shall be entitled to judicial review thereof. Proceedings for review shall be instituted in the circuit court of the county or in the Baltimore City Court, as the case may be, in which is located the institution where the complaint is confined. Review by the court shall be limited to a review of the record of the proceedings before the Commission and the Secretary's order, if any, pursuant to such proceedings. The court's review shall be limited to a determination of whether there was a violation of any right of the inmate protected by federal or State laws or constitutional requirements. (1971, ch. 210; 1973, ch. 588; 1974, ch. 160).

Supreme Court, U. S.
FILED
DEC 29 1975
MICHAEL RODAK, JR., CLERK

APPENDIX (Volume I)

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-44

ROBERT BURRELL, *Petitioner*,

v.

MILTON McCRAY, *Respondent*.

SERGEANT V. D. SMITH, ETC., *Petitioner*,

v.

MILTON McCRAY, *Respondent*.

GERALD McCLELLAN, ET AL., *Petitioners*,

v.

JAMES E. X. STOKES, *Respondent*.

DR. HAROLD M. BOSLOW AND
DR. DOMINGO C. SORONGON, *Petitioners*,

v.

JOHN WASHINGTON, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 9, 1975
CERTIORARI GRANTED NOVEMBER 3, 1975

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

United States District Court for the District of Maryland

McCray v. Burrell — 72-68-N

DOCKET ENTRIES

1972

January 19—(1) Complaint, and affidavit, filed.

January 19—(2) Order (Northrop, C.J.) directing Summons be issued and to be served along with a copy of complaint upon the Office of the Attorney General of Maryland, and granting leave to file in forma pauperis, filed.

January 19—(3) Summons issued. (Served — 1-21-72).

February 9—(4) Supplemental Complaint, filed. (copy to Attorney General of Maryland 2/16/72).

March 14—(5) Motion of Defendant, Warden, Maryland Penitentiary, to Enlarge Time within which to Answer or Other wise Plead and Order (Northrop, C.J.) granting extension of leave to and including April 10, 1972, filed.

April 11—(6) Motion of Defendants and Order of Court (Northrop, C.J.) granting leave for Defendants to answer or otherwise plead until and including 5/1/72, filed.

May—(7) Joint Motion of Defendants in Civil 72-68-N, 72-69-N, and 72-234-N to Dismiss or, in the alternative, Joint Motion for Summary Judgment, Memorandum in support thereof, and Exhibit 1, filed. (3 copies to Judge).

May 31—(8) Notice of Plaintiff to take Deposition of Robert T. Coulter, Executive Director of the Inmate Grievance Commission, upon Oral Examination, filed.

June 6—(9) Motion of Plaintiff to record deposition by other than stenographic means, Memorandum of Points and Authorities in support thereof, and Order of Court (Northrop, C.J.) granting leave as prayed, filed.

June 26—(10) Memorandum of Plaintiff inopposition to Defendants' Motion to Dismiss and Motion for Summary Judgment, Exhibit 1 and 1A, filed. (2 copies to Judge).

June 26—(11) Motion of Plaintiff for leave of Court to filed amended complaint dropping one defendant and adding two other defendants and reformulating the issues, Exhibits A, B, and proposed Order, filed. (2 copies to Judge).

December 13—Status Conference held before Northrop, C.J.

1973

February 14—(12) Appearance of Charles F. Morgan, Esquire, as counsel for Plaintiff, Order, filed.

June 1—(13) Motion of Plaintiff and Order (Northrop, C.J.) that Defendants Produce for Inspection and Copying the Documents therein referred to, filed.

June 1—Status Conference held before Northrop, C.J.

June 6—(14) Writ of Habeas Corpus Ad Testificandum Issued.

June 11—(15) Appearance of Michael S. Elder, Esquire, as Counsel for Plaintiff, Order, filed.

June 11—Plaintiff's Oral Request for Jury Trial Denied by the Court.

June 11—Hearing on Motion of Defendants to Dismiss or, in the alternative, Motion for Summary Judgment before Northrop, C.J.

June 11—Argument of Counsel.

June 11—Not concluded.

June 13—(16) Answer of Defendant Mr. Burrell, Hearing Officer to Amended Complaint, filed.

June 13—Case tried before the Court (Northrop, C.J.).

June 13—Not Concluded.

June 14—Trial Resumed.

June 14—Held Sub Curia — Briefs to be submitted.

June 26—(17) Motion of Plaintiff for leave to amend complaint, amended complaint, and Order (Northrop, C.J.) granting leave to amend complaint, filed.

July 11—(18) Petition of Plaintiff for Issuance of a Subpoena at the expense of the United States of America and Order (Young, J.) nunc pro tunc thereon.

July 11—(19) Stipulation of Counsel that the Copies of attached Orders of the Maryland Inmate Grievance Commission listed herein may be considered as Plaintiff's Evidence. (Filed separately).

July 11—(20) Supplemental Memorandum of Defendant and Copies of Orders of Maryland Inmate Grievance Commission attached.

August 17—(21) Motion of Plaintiff, Milton McCray, for leave to produce additional evidence, and Attachments. (cys, submitted).

August 17—(22) Order (Northrop, C.J.) Denying Plaintiff's Motion for Leave to Produce Additional Evidence. (Copies mailed 8-21-73 now).

October 16—(23) Opinion and Order of Court (Northrop, C.J.) that the Defendants' Motion to Dismiss be and the same is hereby "Denied"; that plaintiff's claim for relief be and the same is hereby "Denied"; Attachments thereto. (Filed Separately).

October 24—Status Conference held before Northrop, C.J.

November 2—(24) Order (Northrop, C.J.) Amending Opinion of this Court dated October 16, 1973 and Directing Clerk to Enter Judgment.

November 5—(25) Judgment (Clerk) Granting Defendant's Motion to Dismiss, and Denying Plaintiff's claim for Relief. (Copies mailed to Plaintiff and to Counsel 11-5-73 now) closed.

November 30—(26) Notice of Appeal of Plaintiff. (copies mailed by Clerk — 11-30-73).

December 12—(27) Motion of Plaintiff and Order (Northrop, C.J.) directing Official Court Reporter to prepare and furnish the transcript of proceedings, as therein set forth, pursuant to U.S.C., Title 28, Section 753(f).

United States District Court for the District of Maryland

McCray v. Smith — 72-234-N

DOCKET ENTRIES

1972

March 7—(1) Complaint, Affidavit and attachments, filed.

March 7—(2) Order of Court (Northrop, CJ) granting leave to file in forma pauperis, directing Clerk to docket complaint without payment of filing fee; and also to issue a summons as therein set forth, filed.

March 7—(3) Summons issued. (Served 3/9/72)

March 16—(4) Motion of Defendant and Order (Northrop, CJ) granting leave to extend time for Defendant to answer or otherwise plead until and including 4/17/72, filed.

April 10—(5) Motion of Defendants and Order (Northrop, CJ) granting leave to extend time for Defendants to answer or otherwise plead until and including 5/1/72, filed.

* * * * * *

May 1—(6) Joint Motion of Defendants in Civil 72-68N, 72-69N and 72-234N to dismiss, or in the alternative, Joint Motion for Summary Judgment, Memorandum in support thereof, and Exhibit 1, filed. (3 copies to Judge).

* * * * * *

April 19—(5A) Motion of Plaintiff for Relief Requested to be Immediately granted, etc., filed.

May 1—(7) Notice (copy) of Plaintiff to take Deposition of Robert T. Coulter, Executive Director of the Inmate Grievance Commission, upon Oral Examination, filed. (Original filed in 72-68-N).

June 6—(8) Motion of Plaintiff to record deposition by other than stenographic means, Memorandum of Points and Authorities in support thereof, and Order of Court (Northrop, C.J.) granting leave as prayed, filed. (Original filed in 72-68-N)

Dec. 13—Status Conference held before Northrop, C.J.

1973

February 14—(9) Appearance of Charles F. Morgan, Esquire, as counsel for Plaintiff, Order, filed.

June 1—Motion of Plaintiff and Order (Northrop, C.J.) that Defendant Produce for Inspection and Copying the Documents therein referred to, filed. (See Paper No. 13 in Civil No. 72-68).

June 1—Status Conference held before Northrop, C.J.

June 6—(10) Writ of Habeas Corpus Ad Testificandum Issued.

June 11—(11) Appearance of Michael S. Elder, Esquire as Counsel for Plaintiff, Order, filed.

June 11—Plaintiff's Oral Request for Jury Trial Denied by the Court.

June 11—Hearing on Motion of Defendant to Dismiss or, in the alternative, Motion for Summary Judgment before Northrop, C. J.

June 11—Argument of Counsel.

June 11—Not concluded.

June 12—Case tried before the Court, Northrop, C.J.

June 12—Oral Motion of Defendant to Dismiss heard and Denied by the Court at the close of Plaintiff's Evidence.

June 12—Not concluded.

June 13—(12) Answer to Complaint, filed.

June 13—Trial Resumed.

June 13—Briefs to be submitted on or before June 21, 1973.

July 11—Stipulation of Counsel that Copies of the Attached Orders of the Maryland Inmate Grievance Commission may be considered as Plaintiff's Evidence. (See Paper No. 19 in Civil No. 72-68-N).

July 11—Supplemental Memorandum of Defendant and Copies of Orders of the Maryland Inmate Grievance Commission. (See Paper No. 20 in Civil No. 72-68-N).

Aug. 17—Motion of Plaintiff, Milton McCray, for leave to produce additional evidence, and Attachments. (See Paper No. 21- Civil No. 72-68-N).

August 17—Order (Northrop, C.J.) Denying Plaintiff's Motion for Leave to Produce Additional Evidence. (See Paper No. 22 in Civil No. 72-68-N).

October 16—(13) Opinion and Order of Court (Northrop, C.J.) that defendants' Motion to Dismiss be and the same is hereby "Denied"; that plaintiff's claim for relief be and the same is hereby "Denied"; Attachments thereto. (Filed separately).

October 24—Status Conference held before Northrop, C.J.

November 2—Order (Northrop, C.J.) Amending Opinion of this Court dated October 16, 1973 and Directing Clerk to enter Judgment. (See Paper No. 24 in Civil Action No. 72-68-N).

November 5—(14) Judgment (Clerk) Granting Defendant's Motion to Dismiss, and Denying Plaintiff's Claim for Relief. (Copies mailed to Plaintiff and to Counsel 11-5-73 now) Closed.

November 30—(15) Notice of Appeal of Petitioner. (copies mailed by Clerk — 11-30-73).

December 2—Copy of Motion of Plaintiff and Order (Northrop, C.J.) directing Official Court Reporter to prepare and furnish the transcript of proceedings, as therein set forth, pursuant to U.S.C., Title 28, Section 753(f). (Original filed in No. 72-68-N Civil Docket — Paper No. 27).

In the United States District Court
For the District of Maryland

Civil No. 72-68-N

Filed January 19, 1972

To the Honorable Judge of Court,

On January 1, 1972 Petitioner, Milton McCray's cell caught on fire, resulting from a lit cigarette falling from his hand into some paper while he was asleep. When he woke up his cell was blazing.

A officer ran up to the door with a fire extinguisher but nothing would come out.

PETITIONER CONTENDS

1. That the officer deliberately brought the empty fire extinguisher to his door knowing that it was empty. He could not help but know it was when he picked it up.

2. That said officer after finding out that said extinguisher was empty ran away and stayed for an eternity. The fire extinguisher being empty almost cost Petitioner his life.

3. That the Officers deliberately took their time putting the fire out, causing him to suffer first degree burns on the face, ears, hand, and arms. He is also having lung trouble.

4. That he has been denied medical treatment for two weeks.

5. That he has been laying on the floor suffering for over two weeks because no doctor would treat him.

6. That each doctor that saw him referred him to another doctor therefore no treatment was received, administered.

7. That because of the doctors deliberate spiteful and unprofessional negligence Petitioner has suffered much pain.

8. That because of the deliberate negligence of the persons responsible the empty fire extinguisher has caused petitioner to suffer unnecessarily.

Wherefore Petitioner pray that this Honorable Court will award him his immediate release and $500,000 in damages.

MILTON MCCRAY

I, hereby, certify due to his poverty, he is unable to pay the cost of this proceeding or give security therefor.

MILTON MCCRAY

In the United States District Court
for the District of Maryland

Civil No. 72-68-N

(Filed February 9, 1972)

Captain Burrell and
Md. Penitentiary Medical Staff
Respondent.

SUIT

Jurisdiction 28 U.S.C. 1343 (3). 42 U.S.C. 1983

To the Honorable Judge of said Court:

On January 1, 1972, Petitioner, Milton McCray's cell caught on fire while Petitioner was in bed asleep, cell door was locked, the cell was totally burnt, walls, bed, mattress, books, papers, etc. it is said that Petitioner was super-lucky to have gotten out alive.

Petitioner suffered burns of the face, eyes, nose, both ears, arm and hand, and swallowed a very great deal of smoke making breathing almost impossible. Petitioner was rushed to the Hospital (institution) where an Officer who has absolutely no authority as a doctor or experience in Medicine, placed cold water pads on petitioner's face and gave him something red to drink and then said lock him in the blue room, Capt. Barrell's orders, until the doctor is located. The blue room consists of ten cells, the window is covered completely with a metal plate, no sink. Petitioner was forced *nude*, in severe pain, with only the hard cement floor to sleep on Capt. Barrell ordered all shifts not to give Petitioner anything until he saw the doctor.

All Saturday and Sunday petitioner laid on the hard cement floor in unbearable pain, petitioner asked, even begged the officer on all shifts for aid, each told him that he must wait to see the doctor, petitioner asked for cough medicine, each officer stated he couldn't give him anything until he saw the doctor, petitioner asked for a bath, same answer.

Tonight is Tuesday January 4, 1972, four (4) days since petitioner was burnt, no doctor has examined petitioner.

Treatment of this kind cannot, I repeat cannot be tolerated, it must not be tolerated, it is the duty of this court to bring an end to the cruel unusual and barbaric treatment, punishment perpetrated vindictively without care or concern for helpless inmates who are completely at the mercy of captains such as Capt. Burrell who acts out of his authority arbitrarily and capriciously, to, the detriment of inmates under his care.

The inmates of this institution through the petitioner, Milton McCray, in this petition entreat this Honorable court to hear this petition and bring an end to this cruel treatment.

Petitioner contends

1. That he was completely refused, cruelly spitefully refused and unconstitutionally refused medical treatment for serious burns of face, eyes, arms, hands, both ears, and chest.

2. That he was placed in the blue room nude in pain with only the cement floor to sleep on, with no toilet, no sink, no hot or cold water, no fresh air inlet, no stale air outlet.

3. That he has not been permitted a bath since 29th of December 1971, still has had no bath or is permitted one.

4. That his entire body is filled with smoke in side and out and no one cares.

5. That he is being held incommunicado, refused legal papers, books, pen and writing paper for all purposes including court, attorney, Warden, Commissioner, Secretary of Public Safety.

6. That he was refused food.

7. That his food and his Black Muslin Religion food is improperly prepared.

8. That a doctor should be on duty twenty-four hours a day in an institution of this capacity.

9. That a particular day is a Holiday is the most absurd, preposterous excuse for this institution not to have a doctor on duty or call.

10. That if it had not been for inmates illegally getting a call out to petitioner's Mother and Wife, and petitioner's Mother immediately calling Capt. Burrell and laying him out, petitioner would have been left to *die* in the blue room.

11. That his face was burnt so badly, he could hardly recognize his self nothing short of a plastic surgery will repair the damage done to his face by Capt. Burrell's contributory negligence, the institution contributory negligence.

Petitioner prays that this Honorable Court immediately order him expert medical treatment, and that Captain Burrell be personally penalized for his cruel and spiteful act.

The State should not be solely responsible for deliberate, spiteful act on the part of its' officers.

Petitioner should be released from custody and a sum of $500.000 be awarded to him for the severe pain and misery he has suffered, is suffering and will suffer, as the result of the gross contributory negligence he is the victim of.

MILTON MCCRAY,
Petitioner, Milton McCray.

I, Milton McCray, hereby certify that I am indigent, without funds to pay for any of the proceedings involved in processing this petition.

MILTON MCCRAY,
Milton McCray 110-563.

In the United States District Court
for The District of Maryland

Civil No. 72-234-N

Milton McCray (110-563)
v.
Sergeant V. D. Smith (Badge No. 153)
Md. Penitentiary

(Filed March 7, 1972)

SUIT

Jurisdiction exist under 28 u. 5. c s 1343(3). Which Provides: "The District court shall have original Jurisdiction of any civil action authorized By law to be commsed by any person:

"(3) To redress the deprivation under the color of any state law, statute, ordinance, Regulation, custom or usage, of any right, privileged or immunity secured by the constitution of the U.S. or by any act of congress provided for equal rights of citizens or of all person within the jurisdiction of the United States:

See: Sostre v. McDinnis, F.2d — (2 Cir. 1971):

Johnson v. Avery, 393 U.S. 483 (1969) Lee v. Washington, 390 U.S. 333 (1968); Houghton v. Shafer, 392 U.S. 639 (1968); Sewell v. Pegelow, 291 F.2d 196, 198 (4).

Cir. (1967). exhaustion of state, legal or equitable remedies is not Necessary. Sostre v. Rockefellow (1970): Gordon v. Fitzharris, (1966). Sostre v. McAinnis F.2d (2 Cir. Feb, 24, 1971)

Statement of Facts

On Wednesday, November 17, 1971 Petitioner, Milton McCray, an inmate at the Maryland Penitentiary was severely beaten by Major Mills and five or six Officers in the isolated office with a telephone book and Life, Look Magazines about the body and head than stripped him of his clothing and throw Petitioner in a cell which was fill with lice and lousy cell. He was taken from said cell and placed in the hole without a Mattress or blanket necessitating sleep on the cold hard concrete floor. Sergeant Smith refused to let McCray see the Doctor.

On Thursday November 18, 1971 the assist Warden was notified. McCray explained what had happened. The assist Warden order him sprayed and deliced, taken out of the hole and given law books, Sergeant Smith told the Warden to his face that he was not going to do nothing for me.

On Friday November 19, 1971 the Sergeant still refused to give me my legal, papers, pen etc. and my medication. He refused to call the Doctor concerning the headaches resulting from being beaten by the Major and officers with the phone book and magazines. McCray's headaches became so unbearable, he could not stand it so he started calling the officer for some kind of medical attention, instead six officer's led by Sergeant Smith who order me dragged out of my cell down four flights of stairs to the hole where all clothing was ripped of and I was dragged into the hole nude, Sergeant Smith then ask me if I still wanted a shower, I said yes. He went away and came back with two buckets of water and threw them on me saying now sleep in it", I almost froze standing in the water for seemingly an eternity, Finally he got an inmate to mop the water up and give me a mattress to stand on until the water dry however he would not give me any thing to dry off with or clothing to put on. Nor would he turn that fan off me. I waited until the shift changed hoping that I could get some clothing, a blanket and the fan cut off. The officer on the next shift refused to give me a blanket or clothing however after many, many request

the officer did turn the fan off which made the coldness a little more bearable nevertheless at about ten or eleven o'clock I could stand it no longer. Therefore I tore a hole in the filthy mattress and slide between the cotton to get and keep warm. I went to sleep. Monday November 22, 1971 still no medicated shower, law books, tooth brush, paste, etc. Tuesday November 23, 1971 I finally saw the Doctor who inquired into the original reason for me being on segregation of Capt. Beaver and Sergeant Smith no one knew, the Doctor ordered showers daily and X-rays taken. Wednesday November 24, 1971 no showers, legal books, paper stamps, tooth brush, paste, etc. but I did received a X-ray of the chest, head and side, result unknown, I received thirty days on segregation and the lost of 10 days good conduct and working time for tearing the mattress to keep warm. Which is very unreasonable considering Hon. Judge Roszel Thompson orders in Bundy v. Cannon (4th District 1971).

Thursday 25, 1971 refused legal books, paper, pen, etc. tooth paste, brush, etc. and medicatal shower, etc.

The following conditions treatment, separately and together, amount to violations of my constitutional rights

(I) segregation and solitary confinement.

(A) that petitioner were not afforded a proper administrative hearing conducted according to provisions embodying procedural due process before the mattress infraction or after.

(B) Petitioner is totally and separately day and nite in a unventilated and unheated cell approximately (7" X 9") for approximately (23½ hours) a day seven days a week.

(C) each cell is without hot water.

(D) the cell and their contents are rarely cleaned and as result are encrusted with dirt and waste materials,

(E) Mattresses are filthy, ragged and odered.

(F) Each cell is infested with cockroaches and unknown bugs, one cell I from personal experience know has lice. Consequently petitioner suffer from roach etc. bites,

(2) Petitioner was brutally attacked and assaulted by Major Mills and Staff Personnel,

(G) petitioner is denied the opportunity to maintain physical health.

(3) Petitioner was spitefully denied medical attention by Major Mills and Sergeant Smith,

(4) petitioner was denied access to the courts for a prolonged period of time.

(5) Negligent and unsanitary handling and serving of food and failure to provide adequate diet in quantity and quality,

(6) Unreasonable and arbitrary restriction on visiting.

(7) Unreasonable censorship of mail.

(9) No radios permitted and no earphone are issued. Ninety five percent of the earphone boxes are disconnected resulting in very little awareness of what is going on in the world.

(10) Petitioner was forced to serve (30) days on segregation for minor rule infraction in deliberate violation of the order of Hon. Judge Roszel Thompson see Brady et al. v. Cannon et al., (Daily Record March, 2, 1971).

Petitioner is suffering physical and mental inhuman treatment under aforesaid conditions. Therefore petitioner prays injunctive relief, and physical release, petitioner further pray pursuant to 42 U.S.C.

(1983) and (28 U.S.C.) (1343) (3) damages of $500.00 for the cruel attack upon him by Major Mills and Staff personnel maliciously vindictively and spitefully, without Justification which resulted in constant severe headaches and blackout

and his refusal to permit petitioner medical treatment. Petitioner became sick, sore and disordered and so remained for a long time. to wit: from thence hitherto up to and including this and I Milton McCray hereby certify that I am indigent without sufficient fund to pay for competant counsel to prosecute the petition or any or the proceeding involved in processing this petition,

MILTON MCCRAY,
In proper person
Milton McCray 110-563

If there is any doubt as to whether violations of the fourteenth amendments by the states officers or agencies, acting in their official capacities, maybe enjoined by the Federal courts. One need only turn to Baker v. Carr, 369 U.S. 186, 8LS ct 691, 7 L. Ed. 2d 663 (1962) and it progeny E. G. Well v. Rockefeller, 273 F. Supp 184 (S.d. N.Y.) Aff'd 389 U.S. 421.88 Sct. 578 19 L. Ed 651 (1967).

Then there is if any doubt as to whether a federal court can award damages against Officials in their Official capacities despite the eleventh amendment. See: Thompson Jordan v. Fitzharris 257, F. Supp 674 (1966) C. C. Governor.

Secretary of Public Safety Mr. Lally
Warden
Major Mills
Sgt. Smith
United States District Court for Maryland

MILTON MCCRAY,
Petitioner sign here Milton McCray 110-563

In the United States District Court
for the District of Maryland

Milton McCray
954 Forrest Street
Baltimore, Maryland 21202,
Plaintiff,

v.

Robert Burrell
Maryland Division of Correction
920 Greenmount Avenue
Baltimore, Maryland 21202,
Defendant.

Civil Action No. 72-68-N

COMPLAINT FOR COMPENSATORY AND PUNITIVE DAMAGES

JURISDICTION

1. Jurisdiction of the Court is invoked pursuant to and in accordance with the provisions of Title 28, United States Code, §§ 1343(3) and (4), Title 42, United States Code, § 1983, and the Constitution of the United States in particular, but not limited to the Eighth, and Fourteenth Amendments thereto.

2. The matter in controversy exceeds, exclusive of interests and costs the sum or value of Ten Thousand Dollars ($10,000.00).

PARTIES

3. The Plaintiff, Milton McCray, is a citizen of the United States, over twenty-one years of age and a resident of Maryland. He is presently incarcerated at the Maryland Penitentiary, 954 Forrest Street, Baltimore, Maryland 21202.

4. Defendant Robert Burrell is employed by the Division of Correction as a hearing officer. During all times mentioned herein, Defendant Burrell was a captain at the Maryland Penitentiary and was responsible for supervising the day shift of the Maryland Penitentiary.

NATURE OF THE ACTION

5. This action, which is authorized by Title 42, U.S.C., § 1983, seeks to recover compensatory and punitive monetary damages for the deprivation under color of law of the rights, privileges and immunities guaranteed by the United States Constitution to the Plaintiff. Specifically, the Plaintiff challenges the constitutionality of the acts of Defendant Burrell, who acted willfully, maliciously and intentionally as well as negligently and recklessly and without authority of law, and with the specific intent to deprive the plaintiff of his right to:

a) Be free from physical abuse and cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution;

b) Be free from arbitrary punishment and abuses as guaranteed by the due process clause of the Fourteenth Amendment;

c) The privileges, rights and immunities afforded by other provisions of the United States Constitution.

STATEMENT OF CASE

6. On the morning of January 1, 1972, the Plaintiff Milton McCray was confined in a segregation cell (#325) on the third tier of the South Wing of the Maryland Penitentiary. At approximately nine a.m., several Correctional Officers working in the South Wing of the Maryland Penitentiary noticed that the Plaintiff's cell was on fire. Although, they attempted to put the fire out, the fire extinguisher they were using would not function properly and therefore they had to wait until another correctional officer, Mr. Wharton,

arrived with an extinguisher that was functioning properly. Once the fire was under control, Correctional Officers Jackson and Wharton were instructed by Defendant Burrell, who on January 1, 1972, was a captain and the supervisor of the day shift in the Maryland Penitentiary, to escort the Plaintiff to the medical dispensary unit so that the nurse could check him for any injuries and then to make sure that the Plaintiff was placed in a medical observation cell.

7. At the medical dispensary unit, the Plaintiff was seen by a nurse, Mrs. Weber and a correctional officer, Mr. Martin, who applied cold compresses to his eyes and ears and bacitracin ointment to all areas stated by the Plaintiff to have been burned or injured.

8. The Plaintiff was then, pursuant to the orders of Defendant Burrell, placed nude in a bare cement "strip" cell which had no mattress, blankets, or proper hygienic facilities (a strip cell containing only a hole for a toilet and no sink).

9. Later that morning, Dr. Holljes, a Maryland Penitentiary physician, was advised of Plaintiff's condition and he instructed the nurse to call Dr. Stewart, another Penitentiary physician. However, Dr. Stewart could not be reached at his home or office and thus the Plaintiff was not seen or examined by a doctor during that day January 1, 1972, or the following day.

10. Thereafter, on January 3, 1972, the Plaintiff was finally released from this "strip" cell by Dr. Campbell, a Maryland that he was able to see a Dr. William Gould, a dermatologist, who that he was able to see a Dr. William Gould, a dermatologist, who, diagnosed his injuries as first degree burns with some secondary pyoderma on the face.

11. As a direct result of the unlawful refusal of the Defendant to insure that a doctor is on duty at all times at the Maryland Penitentiary, or in the alternative to insure that the injured Plaintiff was taken to a doctor or hospital, outside of the Penitentiary, the Plaintiff was caused to suffer extreme physical pain, emotional anguish and injury to his face, ears, arms and hands.

12. In addition, the unlawful and intentional actions of Defendant Burrell, who is being sued individually and in his official capacity, caused the injured Plaintiff to be placed in a cold barren cell without any clothing. As a direct result of these unlawful acts, the Plaintiff was caused to suffer additional physical pain, emotional anguish; and his injuries to his face, ears, arms and hands were made more severe.

13. The unlawful acts detailed in the above paragraphs, were intended by the Defendant to deprive the Plaintiff of due process and equal protection of the law, and the privileges and immunities of citizens secured by the Fourteenth Amendment to the Constitution of the United States. Furthermore, these acts which were carried out under color of state law constituted cruel and unusual punishment in abrogation of the Eighth Amendment to the United States Constitution.

First Claim

14. The failure of the Defendant to insure that a doctor and reasonable medical attention was accessible to Plaintiff when his physical condition so required; and the unlawful action of the Defendant of ordering the injured Plaintiff to be placed in a cold barren "strip" cell without any clothing or bedding has denied the Plaintiff's right to be free from arbitrary denials of life and liberty in contravention of the Fourteenth Amendment to the United States Constitution.

Second Claim

15. The failure of the Defendant to provide that a doctor would be accessible to the Plaintiff, when his condition so required, and the placement of the Plaintiff in the "strip" cell when the Defendant knew that the Plaintiff was injured and in great pain and that the cold cement cell would aggravate these injuries was a denial of the Plaintiff's right to be free from cruel and unusual punishment in violation of his Eighth Amendment rights.

WHEREFORE, Plaintiff respectfully requests this Court to order that Defendant Burrell compensate the Plaintiff in the amount of Five Thousand Dollars ($5,000.00) for compensatory damages and Ten Thousand Dollars ($10,000.00) for punitive damages, plus the costs of this action, and to grant such other relief that this Court deems necessary or appropriate.

Respectfully submitted,

CHARLES F. MORGAN,
MICHAEL S. ELDER,
341 North Calvert Street
Baltimore, Maryland 21202
539-5340,
Attorneys for Plaintiff.

In the United States District Court
for the District of Maryland

Civil Action No. 72-68-N

Milton McCray,
Plaintiff,
v.
Mr. Burrell, Hearing Officer,
Mr. Gerald H. McClellan, Warden,
Maryland Penitentiary,
James Jordan, Commissioner, Division of Correction,
and
Robert J. Lally, Secretary, Department of Public Safety
and Correctional Services,
Defendants.

ANSWER OF MR. BURRELL, HEARING OFFICER

Mr. Burrell, Hearing Officer, by his attorneys, Francis B. Burch, Attorney General, John P. Stafford, Jr. and Gilbert Rosenthal, Assistant Attorneys General, in answer to the claim filed by the Plaintiff, respectfully states in answer to the Statement of Case filed in the Amended Complaint, respectfully states the following:

First Defense

The complaint fails to state a claim against Defendant, Mr. Burrell, upon which relief can be granted.

Second Defense

1. In answer to Paragraph 10, the Defendant alleges that he was not personally present, and therefore is without knowledge or information sufficient to form a belief that to the truth of the allegations contained in Paragraphs 10, 11, 13, 14 and 15.

2. In answer to Paragraph 12, the Defendant believes that he may have ordered the Plaintiff to be placed in a

cell which had no mattress or blankets, but the Defendant denies that there were improper hygenic facilities.

3. In answer to Paragraph 16, the Defendant denies that he acted in an unlawful or intentional action to cause the Plaintiff to suffer physical pain, emotional anguish, or any other allegation contained in Paragraph 17 of the Complaint.

WHEREFORE, the Defendant, Mr. Burrell, prays the above action to be dismissed.

FRANCIS B. BURCH,
Attorney General,
JOHN P. STAFFORD, JR.,
Assistant Attorney General,
GILBERT ROSENTHAL,
Assistant Attorney General
One South Calvert Building
Baltimore, Maryland 21202
Telephone — 383-3737
Attorneys for Defendants.

I HEREBY CERTIFY that on this day of June, 1973, a copy of the foregoing Answer of Mr. Burrell, Hearing Officer, was mailed, postage prepaid, to Charles F. Morgan, Esq., 341 North Calvert Street, Baltimore, Maryland 21202, Attorney for Plaintiff.

GILBERT ROSENTHAL,
Assistant Attorney General.

In the United States District Court
for the District of Maryland

Civil Action No. 72-234-N

Milton McCray,
Plaintiff,
v.
Sergeant V. D. Smith (Badge No. 153 — Maryland Penitentiary),
Defendant.

ANSWER OF SERGEANT V. D. SMITH

Sergeant V. D. Smith (Badge No. 153 — Maryland Penitentiary) by his attorneys, Francis B. Burch, Attorney General; John P. Stafford, Jr. and Gilbert Rosenthal, Assistant Attorneys General, in answer to the claim filed by the Plaintiff, respectfully states in answer to the Statement of Case filed in the Amended Complaint, respectfully states the following:

First Defense

The Complaint fails to state a claim against Defendant, Sergeant V. D. Smith, upon which relief can be granted.

Second Defense

That in each and every allegation in the Plaintiff's Complaint, which the Defendant, Sergeant V. D. Smith, has personal knowledge, the Defendant denies each and every allegation contained in the Complaint.

WHEREFORE, the Defendant, Sergeant V. D. Smith, prays the above action to be dismissed.

FRANCIS B. BURCH,
Attorney General
JOHN P. STAFFORD, JR.,
Assistant Attorney General,
GILBERT ROSENTHAL,
Assistant Attorney General,
One South Calvert Street,
Baltimore, Maryland, 21202.

I HEREBY CERTIFY that on this day of June, 1973, a copy of the foregoing Answer of Sgt. V. D. Smith, was mailed, postage prepaid, to Charles F. Morgan, Esq., 341 North Calvert Street, Baltimore, Maryland 21202, Attorney for Plaintiff.

GILBERT ROSENTHAL,
Assistant Attorney General.

In the United States District Court
For the District of Maryland

Civil Action No. 72-68-N

Civil Action No. 72-234-N

Milton McCray

v.

Robert Burrell

Milton McCray

v.

Sergeant V. D. Smith
[Sergeant Bernard D. Smith]
(Badge No. 153)

ORDER TO AMEND OPINION OF THIS COURT DATED OCTOBER 16, 1973 AND DIRECTING CLERK TO ENTER JUDGMENT

IT IS, this 2nd day of November, 1973, ORDERED that the Opinion of this Court filed in the captioned cases on October 16, 1973, BE and the same HEREBY is amended and changed in the following manner:

Page 61 — seventeenth (17th) line from top of page. The word "DENIED" shall be stricken and the word "GRANTED" shall be substituted in lieu thereof, so that the sentence will read:

"1. That the defendants' Motions to Dismiss in Civil Actions Nos. 72-68-N and 72-234-N be, and the same hereby are, GRANTED."

AND IT IS FURTHER ORDERED that the Clerk of this Court shall enter judgment accordingly.

EDWARD S. NORTHROP
Edward S. Northrop,
Chief United States
District Judge.

In the United States District Court
For the District of Maryland

Civil Action No. 72-68-N

Milton McCray
v.
Robert Burrell

JUDGMENT

In accordance with the Opinion of the Court dated October 16, 1973, filed in the above case, and Amended by Order of the Court dated November 2, 1973, it is

ORDERED AND ADJUDGED:

1. That the Defendant's Motion to Dismiss be, and the same hereby is, GRANTED;

2. That the Plaintiff's claim for relief be, and the same is, DENIED.

Dated at Baltimore, Maryland this 5th day of November 1973.

PAUL R. SCHLITZ,
Clerk.
By: EARL L. GRAHAM,
Deputy Clerk.

In the United States District Court
For the District of Maryland

Civil Action No. 72-234-N

Milton McCray

v.

Sergeant V. D. Smith
(Sergeant Bernard D. Smith)
(Badge No. 153)

JUDGMENT

In accordance with the Opinion of the Court dated October 16, 1973, filed in the above case, and Amended by Order of the Court dated November 2, 1973, it is ORDERED AND ADJUDGED:

1. That the Defendant's Motion to Dismiss be, and the same hereby is, GRANTED;

2. That the Plaintiff's claim for relief be, and the same hereby is, DENIED.

Dated at Baltimore, Maryland this 5th day of November 1973.

PAUL R. SCHLITZ,
Clerk

By: EARL L. GRAHAM,
Deputy Clerk.

United States District Court for the District of Maryland

Stokes v. McClellan — 73-1182-B

DOCKET ENTRIES

1973

December 4—(1) Complaint, Affidavit, and Exhibits A through G.

December 4—(2) Order of Court (Blair, J.) granting leave to file in forma pauperis and directing issuance of summons by U.S. Marshal with copy of complaint on the Attorney General of Maryland and on the defendants named in the complaint.

December 5—(3) Summons issued. (All served)

December 17—(4) Supplement of petitioner to Prayer for Relief and attachment.

December 21—(5) Motion of defendant for enlargement of time and order (Blair, J.) Dated December 27, 1973 that the time for filing responsive pleadings, etc. is hereby extended to and including January 10, 1974. (Cys. mailed)

1974

January 11—(6) Motion of defendant to dismiss or in the alternative motion for summary judgment and memorandum in support thereof. (Cys. submitted)

March 1—(7) Memorandum (Blair, J.). (Cys. mailed as directed)

March 1—(8) Order (Blair, J.) dismissing complaint without prejudice to its reinstitution upon exhaustion of remedies available through the Maryland Inmate Grievance Commission as therein more particularly set forth. (Cys. mailed as directed) Closed

March 15—(9) Notice of Appeal of Petitioner. (copies mailed by Clerk — 4-16-74).

In the United States District Court
for the District of Maryland

Civil No. ___
(To be supplied by Clerk of Court)

James E. X. Stokes,
Plaintiff,
v.
Gerald McClellan, individually and in his official capacity as Warden of Maryland Penitentiary, and the Mail Censor, individually and in his or her official capacity as Mail Censor of the Maryland Department of Corrections,
Defendants.

SUIT FOR PRELIMINARY AND PERMANTENT INJUNCTIVE RELIEF

(Filed December 4, 1973)

Demand for Jury Trial

1. JURISDICTION

1. This is a civil action authorized by 42 U.S.C. Sec. 1983 to redress the deprivation, under color of State law, of rights secured by the Constitution of the United States. The Court has jurisdiction under 28 U.S.C. Sec. 1343. Plaintiff seek declaratory relief pursuant to 28 U.S.C. Secs. 2201 and 2202.

II. PLAINTIFF

2. Plaintiff James E. X. Stokes was (is), at all times mentioned herein, a prisoner of the State of Maryland, in the custody of the Maryland Department of Corrections. He is currently confined at the Maryland Penitentiary, 954 Forrest Street, Baltimore, Maryland 21202.

III. DEFENDANTS

3. Defendant Gerald McClellan is the Warden of Maryland Penitentiary. He is legally responsible for the operation of Maryland Penitentiary and for the welfare of all the inmates of that prison.

4. The Mail Censor inspects in-coming as well as out-going mail, newspapers, etc. and he or she is legally responsible for seeing to it that newspapers are forward to all inmates of that prison. Maryland Penitentiary.

5. At all times hereinafter mentioned, defendants seperately and in concert, acted under color and pretense of law, to wit, under color of statutes, regulations, customs and usages of the State of Maryland. Each of the defendants herein, separately and in concert, engaged in the illegal acts hereinafter mentioned to the injury of Plaintiff and deprived plaintiff of his rights, privileges and immunities secured to him by the First and Fourteenth Amendments as well as the Fourth as it relates to the Ninth Amendment to the Constitution of the United States.

IV. STATEMENT OF CASE — FACTS

6. Prison officials (Wardens) have always found something up-setting about what Black prisoners read. Especially white racist-minded type officials.

7. In the past, prison administrations even sought to justify excluding Muhammad Speaker because, inter alia, its format in many respects is anti-government and racist", and would interfere with rehabilitation.

8. It is such racism and racial discrimination as the aforementioned that explains this instant case — cause of action.

9. Plaintiff has been receiving both the Gay Liberator newspaper and Akwesasne Notes (a Native American newspaper) because he was (is) interested in both the educational and political point of view and.

10. Up to July 1973, the Warden and his agent (Mail Censor) began returning the papers to the senders marked "disapproved."

11. Both Defendants did and still is engaging in a concerted on-going act of psychological warfare which, has and still is causing Plaintiff much mental anguish and emotional suffering.

12. If Plaintiff can have pictures such as Exhibits A, B, C and D, than surely he can have in his personal and private possession educational and political literature to read.

13. Attached hereto is a copy of Exhibits E, F and G of Plaintiff's attempt to find-out why the Mail Censor would not and will not deliver the said papers to him and, inform the Warden of the Mail Censor actions.

14. Since the Warden was informed of this problem and, by his refusal to order his agent (Mail Censor) to cease and desist from such un-constitutional practices or policies he became an accessory after the fact and, or the Mail Censor informed him of his or her actions wherefore,

15. The Warden was accessory before and after the fact.

V. Legal Claims

16. Plaintiff has and is being deprived of his right to possess and read educational/political literature, which is guaranteed by the First Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment. The confiscation/returning of the papers also deprived Plaintiff of his property without the due process of law required by the Fourteenth Amendment.

17. Plaintiff right to privacy is being violated by defendants interfering with not only with his educational/political thoughts but his right to choose and free will to possess and read such relevant literature in the confines of his cell as is guaranteed by the Fourth Amendment as it relates to the Ninth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment.

18. Plaintiff have no plain, adequate or complete remedy at law to redress the wrongs described herein. Plaintiff have been and will continue to be irreparably injured by the conduct of the defendants unless this court grants the declaratory and injunctive relief which plaintiff seek.

Wherefore, plaintiff respectfully pray that this Court enter judgment granting plaintiff:

1. A declaratory judgment that the defendants acts, policies and practices described herein violate's not only plaintiff rights under the United States Constitution but is also racist, and racial discriminatory to Native Americans and, prejudiced to Gays as a class.

2. A preliminary and permanent injunctive which

a. Requires defendants McClellan and Mail Censor to cease and desist from confiscating and returning "Gay and Native American" literature in the future.

b. Requires defendant McClellan to rescind the policy directive concerning confiscation of and returning Gay and Native American literature and to issue regulations which prohibit any such confiscation and the returning of such literature in the future.

c. Prohibits defendants, their agents, employees, successors in interest and all other persons in active concert or participation with them, from further racial and/or class discrimination against Gays and Native American people by their refusal to deliver the "Akwesain Notes and Gay Liberator newspaper to plaintiff which is discriminatory to plaintiff as well, since such practices or policies interferes with his right to education and political belief, during the pendency of this action.

d. Requires defendant McClellan to allow plaintiff and other prisoners to: 1) engage in any oral or written communication which is reasonably related to the conduct of this suit, including the preparation of affidavits on behalf of other prisoners; and 2) to confer with other prisoners and prepare legal papers, and to do anything else, consistent with prison security, which is reasonably connected with the conduct of this suit.

3. Compensatory damages in the amount of $10,000 to plaintiff from both defendants and each of them.

4. Punitive damages of $10,000 to plaintiff from Defendant McClellan and from Defendant the Mail Censor.

5. Trial by jury on all issues triable by jury.

6. Such other and further relief as this court may deem just, proper and equitable.

A motion to proceed in Forma Pauperis is attach hereto, along with plaintiff's brief, and motion for appointment of counsel.

Dated: Sept. 6, 1973

Constitutionally submitted,

JAMES E. X. STOKES, PROSE
James E. X. Stokes,
Maryland Penitentiary,
954 Forrest St.,
Baltimore, Md. 21202,
In Propia Personam.

In the United States District Court
For The District of Maryland

James E. X. Stokes,
Plaintiff,

v.

Gerald McClellan, individually and in his official capacity as Warden of Maryland Penitentiary, and the Mail Censor, individually and in his or her official capacity as Mail Censor of the Maryland Department of Corrections,
Defendants.

Civil No. ____

BRIEF

Since the defendants never supplied plaintiff with a reason for their "all of a sudden" total disapproval of Akwesasne Notes and Gay Liberator plaintiff can only conclude that the refusal to deliver Akwesasne Notes was (is) based on "racial and class discrimination" which, has and is being directed against all people of color, Red in reference to Native Americans and, the refusal to deliver Gay Liberator is based "solely" on class prejudice of people who do not suffer" racial or class hang-ups as the defendants. Wherefore, the defendant seeks to ban the said newspapers for the reasons stated herein and, including the fact that plaintiff is a Black person. Defendant McClellan like all white racist prison officials believes it is a crime for Black prisoners to read any literature that is not all-Amerikkkan and anti-people. Furthermore, the defendants seem to be saying: that they, agents of the State, supersede the federal government, nullifying the Constitution of the United States. Otherwise, the

defendants would not arbitrarily censor, regulate and abuse plaintiff rights which, are guaranteed by the First Amendment. Wm. Fortune Society v. McGinnis, 319 F. Supp. 901 (S.D. N.Y. 11-24-70) the Court noted the absence of a compelling state interest centering about prison security or discipline, to justify the serious and irreparable injury to a "preferred" freedom under the First Amendment. Censorship is utterly foreign to our way of life, it smacks of dictatorship. Correctional and prison authorities, no less than the courts, are not above criticism, and certainly possess no power of censorship simply because they have the power of prison discipline, in granting the preliminary injunction.

JAMES E. X. STOKES,
James E. X. Stokes,
Maryland Penitentiary,
954 Forrest Street,
Baltimore, Md. 21202,
In Propais Personam.

In The United States District Court
For The District Court of Maryland

James E. X. Stokes,
Plaintiff,
v.
Gerald McClellan, et al.,
Defendants.

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*Civil No.*____

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Upon the complaint, the supporting affidavit of plaintiff, and brief submitted herewith, plaintiff move this court to order Gerald McClellan and the Mail Censor to show cause why a preliminary injunctive should not be issue pursuant to Rule 65(a) of the Federal Rules of Civil Procedure enjoining the defendants, their successors in office, agents and employees and all other persons acting in concert and participation with them, from interfering with, and returning the Gay Liberator and Akwesasne Notes newspapers to senders marked "disapprove".

JAMES E. X. STOKES, PRO
James E. X. Stokes,
Maryland Penitentiary,
954 Forrest St.,
Baltimore, Md. 21202.

July 30, 1973

Dear Miss, Mrs, Ms or Sir,

I have received letters informing me that you are returning the Akwesasne Notes and Gay Liberator newspapers marked "not approved".

In the future you will please cease and desist from such acts.

JAMES E. X. STOKES
Cell #130
South Wing.

August 15, 1973

Re: Letter dated July 30, 1973

Once against I have received words concerning returning reading matter wherefore you will now give me notification. I have a chance to reply in writing or orally before you return any Gay Liberator and/or Akwesasne Notes in the future.

JAMES E. X. STOKES

August 15, 1973

Mr. McClellan,

I have written the Mail Censor concerning Gay Liberator and Akwesasne Notes newspaper. As of yet, I have received no answer. Therefore, I can only assume that you have sanction his or her acts. If I do not receive words from you by 29 August 1973, as to any I no longer can receive the said newspapers mentioned herein. I will take court action.

JAMES E. X. STOKES
South Wing

Note: Letter to Mail Censor July 30 and one (1) this morning.

In The United States District Court
For The District of Maryland

Civil No. 73-1182

James E. X. Stokes,
Plaintiff,
v.
Gerald McClellan, Warden, et al.,
Defendants.

Filed December 17, 1973

SUPPLEMENT TO PRAYER FOR RELIEF

In supplement to the above cause, petitioner prays that this court will impose First Amendment procedural standards on the defendants as follows:

1. Notice and reason (s) in the future for refusal to deliver the said papers or correspondence;

2. Some opportunity for the plaintiff to object (either personally or in writing;)

3. A decision by a body that can be expected to act fairly and,

4. That the screening process be exercised within a set reasonable period of time.

Dated: December 10, 1973

Constitutionally submitted,

JAMES E. X. Stokes
James E. X. Stokes
954 Forrest Street
Maryland Pemitentiary
Baltimore, Maryland 21202

December 10, 1973
954 Forrest St.

Dear Clerk,

Please inform Judge Blair that unless First Amendment procedural safeguards are impose upon the defendants they will only continue to arbitrary deny any and all reading matters without affording any due process what so-ever. Example: on or about the 5th or 6 December I received a memo from a Mr. Folse. Classification counselor here at the Pen. Informing me that Worker World, another newspaper had been disapproved because of so-called security. And, even though I have tried to get appointment with Mr. Fine, Asst. Warden of Treatment as well as written to The Warden I have yet to this writing heard anything concerning my request to Mr. Fine and Warden McClellen that in the future they afford me at least minimum due process before they disregard my first amendments rights.

JAMES E. X. STOKES

PROCEEDINGS OF JUNE 12, 1973

(171) (The Clerk) Civil Action 72-234-N, Milton McCray versus Sergeant V. D. Smith, Maryland Penitentiary.

(The Court) All right.

(Mr. Morgan) Your Honor, if I may, just briefly, state what this case is about.

What we are alleging in this case, Your Honor, is that at a period of time when Mr. McCray was in the south wing segregation section in the Penitentiary, he was removed from his segregation cell and placed into an isolated confinement area by the Defendant, Sgt. Smith, where he remained for at least two days. He was then placed back into the regular segregation section of the Penitentiary.

We are claiming damages as relief, and our claim is based on two legal theories. First, we're saying that the conditions under which Mr. McCray was confined in that two-day period violated his right to be free from cruel and unusual punishment under the Eighth Amendment.

Also in that connection, we are alleging that the confinement, conditions of the confinement during that two-day period subjected Mr. McCrary to unwarranted and unneces- (172) sarily degrading and undignified treatment, violating his right to privacy.

The second basis of the claim is a Fourteenth Amendment claim, and that is that the punishment imposed upon Mr. McCray, the punishment being the placement in the isolated confinement cell for two days, was summarily imposed by the Defendant without any semblance of procedural due process either before, during or after the punishment, with no justification for that summary punishment.

Mr. McCray suffered injuries as a result of his confinement in isolated — as a result of his confinement in isolation, and the relief he requests are compensatory damages, to compensate for violation of his constitutional rights, nominal damages, and puni-

tive damages against the Defendant, punitive damages because the Defendant was acting under rules and regulations which he should have known, rules and regulation which set forth constitutional standards and which he consciously violated.

(The Court) All right.

(The Clerk) Mr. McCray, you are still under oath for the purposes of this action, also, 72-234.

By Mr. Morgan:

Q. Mr. McCray, just state where you are presently confined. A. Maryland Penitentiary.

(173) Q. Maryland Penitentiary? A. Yes.

Q. Could you tell the Court how old you are, please? A. 33.

Q. Are you from Baltimore? A. Yes, I am.

Q. Born in Baltimore? A. Yes.

(The Court) Now, answer so that the Reporter can get it down.

(The Witness) Yes, to all the questions that he asked.

By Mr. Morgan:

Q. Mr. McCray, when did you begin service of the sentence that you are presently doing? A. February 4th, 1969.

(The Court) February 4, what?

(The Witness) 1969.

(The Court) 1969?

(The Clerk) 1969.

(The Court) All right.

By Mr. Morgan:

Q. And what is the sentence you're serving, Mr. McCray? A. 28 years.

(174) (The Court) 28, what?

(The Witness) Years.

By Mr. Morgan:

Q. For what offense, Mr. McCray? A. Deadly weapon, assault with intent to murder; deadly weapon, assault with intent to murder, and—

(The Court) Now, speak up.

Fix it up so he can speak into it.

(The Witness) I like to talk to the Judge.

(The Court) Just look straight ahead, or look at counsel, that's all right, just make sure you talk into that thing, right?

(The Witness) I like to talk to the man that has the power to—

(The Court) Yes, I notice you do that, but that's perfectly all right, I can hear you, that's okay now, if you want to talk over here, that's fine.

Now, put that microphone up near you and speak up.

By Mr. Morgan:

Q. Mr. McCray, before the time you entered prison on this sentence, February 4th, 1969, had you been employed? A. Repeat that.

Q. Had you been employed prior to the time that you entered prison on this sentence? (175) A. Yes, I owned my own grocery store.

Q. Where was that located? A. Barclay Street.

Q. What was the name of the store? A. Sander's Grocery.

Q. Mr. McCray, in a case of this kind, it's proper for the State, or the Defendant, to cross-examine you on the question of your past criminal record.

We have agreed, your counsel and the State has agreed during the recess to try to work out what that past criminal record is, and we'll stipulate to it, so I won't ask any questions about it and the State won't ask any questions about it, but we will agree to that.

(The Court) All right?

(The Witness) Yes, sir.

I'm not proud of my criminal record.

(The Court) What?

(The Witness) I'm not proud of my criminal record, but it's mine.

By Mr. Morgan:

Q. Mr. McCray, I direct your attention to November 20th, 1971, were you in the Penitentiary at that time? A. Yes.

Q. What part of the Penitentiary were you in? A. South wing.

(176) Q. Could you describe to the Court what the south wing is? A. South wing is the area of the Penitentiary where they house inmates that are in violation of the Penitentiary rules.

Q. Could you describe that section briefly? A. Well, it's a desolate place, I that just about — it's cold, it's lonely, and it's cruel.

(Mr. Rosenthal) I object to that, Your Honor.

(The Court) Well—

(Mr. Rosenthal) I think that's a conclusion.

(The Court) Yes, okay.

(The Witness) That's a fact.

(The Court) Objection overruled.

Go on.

By Mr. Morgan:

Q. Mr. McCray, could you describe the south wing physically, for example, how the tiers are laid out, how the cells are laid out? A. Well, it's — it has five tiers, the doors are key operated with a lever back in the tier, this is old fashioned, is an antique system there. It's filthy. That's just about it. It's cold, filthy and just operated by an old lock system.

Q. Mr. McCray, on November 20th, what part of the south (177) wing were you housed in? A. On what day?

Q. On November 20th, 1971? A. In the hole area. That—

Q. Prior to being housed in the hole area, where were you housed? A. On the second tier, I think it was, on street side in the south wing.

Q. The second tier means two floors off the ground? A. Two floors off the ground, yes. I'm not sure, I know it was in that south wing area, either the second or fourth, I've been over there quite a few times.

Q. Mr. McCray, you are aware of the complaint that you made in this case and I think to save time if it's agreeable with the State, rather than my asking you directly, direct questions about it, could you describe what happened to you on November 20th while you were in that tier, the nature of your complaint in this case? A. Do you want me to describe what led up to this case?

Q. Yes. A. Well, when I was put in south wing that time, they put me in the cell on the second tier, and the cell they put me in, I mean, was filthy. Trash, dirt, torn mattresses, parts of mattresses on the floor. It just hadn't been cleaned.

(178) I immediately called the officer and explained to him that I should be moved to another cell, and the officer looked in the cell and he saw that the cell was in bad condition, so he called the tier runner and asked the tier runner, why didn't you clean the cell, why is this cell like it is, and the tier runner at that time—

(The Court) Who?

(The Witness) The tier runner at that time told him that no one supposed to be in the cell because the cell had lice in it, because someone in the cell had lice, and when I heard this, I really performed.

So, they finally took me out of the hole — I mean, out of the cell and placed me in the hole area, isolated area.

(The Court) What?

(The Witness) This the hole area, this is an isolated area where there is six cells and no bed, a toilet and a

sink, this is another part of the south wing, this is the area that they place you in if you violate a rule on south wing.

I immediately asked for a shower as a result of being in the cell with lice in it.

(Mr. Morgan) Excuse me.

By Mr. Morgan:

Q. Mr. McCray, if I may interrupt, could you place this in time, was this on the 20th, or was this before the 20th, (179) or— A. This was before the 20th, this, I think, led up to me being on the south wing.

Q. I see.

All right.

A. The Warden came through and I called him and I explained to him that I was in south wing, in the hole, because they had just taken me out of the cell that had lice in it and no one would give me a shower as a result of it.

He had to call the officer and asked about it, and they verified my statement. So, in turn, he ordered Sgt. Smith here to give me a shower and to see that I get my law books and take me out of the hole.

Sgt. Smith told him, he was quite angry at me for, I guess, approaching the Warden, and he told the Warden to his face that he wasn't going to do anything for me.

Well, anyway, another officer, I don't know whether Sgt. Smith ordered him to do it, or not, got me. I don't know whether Sgt. Smith ordered him to give me a shower and spray some delicer, or whatever it was, powder on me, or not, but an officer came in and he took me down, gave me a shower, and sprayed me with powder.

They then placed me on fourth tier, I think it was third or fourth tier, in another cell, and I stayed there, I think, for a day or so, but immediately after I was put in the (180) cell I asked Sgt. Smith to give me the law books that the Warden had ordered me to have. He wouldn't give them to me. I asked a couple other officers

that came by that — I informed them that the Warden had ordered me to get my law books and Sgt. Smith wouldn't give them to me and would they check and see whether they could get them for me.

Well, I didn't get them.

So, on the — I think it was on the 19th, or 20th, I decided that I had a right to demand my law books since the Warden had — I had gotten the okay from the Warden to have them. So, I started hollering and calling an officer to give me my law books, and the shower, the Warden also ordered this for me, and Sgt. Smith came around and he told me that if I didn't shut up, what he was going to do, you know, and I kept calling. I told him I only wanted what was — what I was entitled to.

Q. If I might interrupt, Mr. McCray, what were the things that you were asking Sgt. Smith for at that point? A. My shower, daily showers, because of the prescription that was given to me by Dr. Gould at Maryland Penitentiary, that I should have a medicated shower every day, and I felt that I had a right to have that also because the doctor ordered it, and Sgt. Smith, he came to my door about 10 minutes later and asked me what was the problem, you know. I told him I wanted the law books, I said, Man, you was there (181) when the Warden told you to get me the law books and he told you to give me a shower, and he told me something about the shower was being deliced, and as far as the law books goes he just didn't have time then and when he get time he will bring them to me, you know, and one word led to another, and, finally, he opened the door and said, all right, him and another officer, let's go down to the hole.

I told him. look, Man, I said, I'm not going nowhere, I haven't done anything. So, I sit down on the floor. So, he told the officer, let's take him out. So, each one of them grabbed me by the arms and dragged me out to the end of the tier, and Sgt. Smith dragged me down the steps, but the other officer, I don't know if he felt sorry for me, or not, he said, no, don't drag him down, he said, I'll pick him up.

So, the officer picked me up by the shoulder and led me down in the hole area.

While down there, when I got in the hole area, he told me to take my clothes off, so I was taking off my clothes and I wasn't taking them off fast enough, Sgt. Smith reached up, he said, hurry up, I don't have all day to wait for you to take your clothes off, and he tore off my jump suit and shoved me in the hole area.

Just as he was getting ready to go out the door, I said, Man, what about my shower. He said, what about it? (182) I said, Man, aren't you going to give me my shower, I got a prescription for it, I said, I been getting this shower every day in another institution prior to coming here and I've been taking it every day outside, I need it in order for me to sleep comfortable. He says, you want a shower? I said, yes. So, he went around one of the cells, back in the corner there, and I was standing at the door, I never thought he was going to throw any water, I thought he was going back to get a key, I didn't know what he was going to do.

Anyway, I was standing at the door and he come around the bend and before I could get myself together he dashed me with this bucket of water, and he said, now, you got your shower, and he walked on out.

Well, I said a few words behind that, and it was cold there that particular day, and—

Q. Mr. McCray, if I might interrupt you at this point to ask you a couple of specific questions. A. Yes.

Q. About what you've said so far. A. This has been so far away, I can't remember, I've got it pretty well.

Q. All right, sir.

Mr. McCray, you say you had been calling for law books, why did you need the law books? A. Well, I have quite a few cases in different courts (183) all over the state and if I don't file answers, letters, or, well, I just have the time for the letter to go out, or I'll forget them, or my work will get behind, and I was particularly interested in having my law books at that time because of that reason.

Q. What law books did you own at that time? A. I owned quite a few law books, boxes, I had about two or three boxes of law books. I'm sure Sgt. Smith can verify that.

Q. What was the nature of the prescription you said you had gotten from Dr. Gould concerning a shower? A. Well, it was — I was supposed to get a shower every day and I have to have an oil to my body, and I think — a cream, I have a nervous condition and keep down the itch, and this had been going on, oh, about two years, and Dr. Gould has been constantly keeping me on this because it's the only thing that helped me, the showers and the alpha keri oil and the cream, this was the only thing he could prescribe that would help the condition.

Q. Now, before you were taken to the hole, Mr. McCray, isolated confinement, you say Sgt. Smith came to your cell? A. Yes, he did.

Q. And you requested these two items from him, law books and showers? A. That's correct. I said, all I want is my law books (184) and my daily shower.

Q. And what did Sgt. Smith say, if anything, to you? A. He told me that he wasn't going to give me the law books and I reminded him of the Warden's order, and he told me that he didn't care, he just wasn't going to give them to me.

Q. Now, at this time, Mr. McCray, I believe you testified you were on the third or fourth tier, which side of the institution was that on? A. On the yard side.

Q. It was on the yard side? A. Yes, on the yard side.

Q. Could it possibly have been on the street side? A. No, it wasn't, it definitely wasn't the street side, I remember it was on the yard side, I was on the street side before they put me in the hole.

Q. I see.

Do you recall how many other men were on that same row of cells with you? A. I didn't stay up there, like I say, a few hours, I guess, it wasn't long enough for me to know who was on the tier.

You see, once you're locked in your cell, you don't know who's next door to you unless you get a chance to talk through the wall.

(185) Q. I see.

At the time that you were yelling out the door of your cell, I believe you did testify you were yelling for these things? A. Yes.

Q. Was there anyone else in south wing yelling out the doors of their cells? A. Oh, no, no, there wasn't anybody else yelling, I was just calling Sgt. Smith, you know, constantly calling, and that was it.

Q. To your knowledge, Mr. McCray, were any inmates out on your tier at that time, out of their cells? A. No, no one, they're not permitted out of their cells.

Q. Now, you testified that Sgt. Smith, with other officers, took you down from the third or fourth tier to the— A. Yes.

Q. —flats, as it's referred to, the bottom floor of the south wing, is that correct? A. Right.

Q. And they took you into what is known as the isolated confinement area? A. Yes.

Q. You referred to it as the hole? (186) A. Yes.

Q. Could you describe that area physically, for example, if there are cells there, how many, what the cells look like, what the area in general appears? A. Well, it has two entrances. One from the Captain's office at the time, the other one from south wing area. There's no windows in the hole area. They have six cells. In each cell there's a toilet and sink combination — I think it is — yes, they have a light in the back of the cell, that is never turned on, the only way it can be turned on, the officer has to go all the way around behind the cells and turn it on. Sometimes they turn it on during the day, and at night. It has a cement block on the floor for a bed.

(The Court) Cement, what?

(The Witness) Cement block, about this long, about — it's about eight inches long.

By Mr. Morgan:

Q. Mr. McCray, do you recall which of the six cells you were placed in? A. What?

Q. Do you recall which of the six cells you were placed in? A. Number five.

Q. All right. (187) Now, how large was that cell, if you would estimate? A. It's about as big as that table that's in back of the chair, I think, from the beginning of this table to the back of your chair.

Q. About that wide? A. Yes, about that wide.

Q. Approximately four to five feet? A. Approximately that.

Q. And about how long would you say? A. Maybe 12, 15, 16 feet, I guess, I don't know.

Q. It's a long, narrow cell? A. It's long and narrow, yes.

Q. It's more long and narrow than it is square? A. Much more long and narrow than it's square.

Q. All right.

Now, you testified that in these cells, and I direct your attention just to the cell you were in, there's a toilet and a sink, is that right? A. Yes.

Q. Were those things in your cell? A. There was a toilet and a sink in the cell I had.

Q. How high is the cell, by the way? A. It's quite high, I would say about 18 feet. It's quite high.

Q. It's more than three times as tall as you are? (188) A. I would say two times, about twice as tall as I am.

Q. What is the construction of the walls in the cell? A. Cement.

Q. Cement? A. Yes.

Q. Are they painted? A. Yes.

Q. I'm directing your attention now to the time when you were there, they were cement then and they— A. A brownish orange color, I think, orange or yellow.

Q. Now, if you would, would you describe again this cement block that was in the cell? A. Well, it's just a big cement slab in the floor, up against the wall, about nine feet long and about three or four feet wide, I guess it is.

Q. And how deep is it? A. About six — about 12 inches.

Q. All right.

(The Court) About twelve inches?

(The Witness) Yes, high.

By Mr. Morgan:

Q. And that's made out of cement? A. Yes.

Q. Now, is there a light in your cell? (189) A. There's a light in the back of the cell, turned on late in the evening, it's not during the day.

Q. Does the cell have doors? A. It has two doors.

Q. Would you describe those two doors? A. One is barred, the other one is a wooden door.

Q. A solid wooden door? A. A solid wooden door.

Q. Which door is inside and which door is outside? A. The barred door is inside, the wooden door is outside.

Q. All right.

Now, when you were placed in your cell, were either or both of those doors closed? A. At times. Whenever an inmate is brought into the south wing area, they always close the wooden door. Other than that, they will leave it open, unless they want to — an officer just wants to be nasty, or he just don't like you, he will lock that door.

Q. On this particular occasion, did — was the outer door, the solid door, closed on you, or not? A. After he throwed the water on me, he slammed the door just before he walked away.

Q. The solid wooden door? A. Yes, but he didn't lock it, I shoved it back open.

(190) Q. How long was the solid door closed, altogether? A. Well, just throwed the water and when I jumped back from the water, the door was closed, you know, and I come back up to the door and pushed it back open at that time.

Q. All right.

Now, when you entered the cell, you testified that there's a concrete slab on the floor and there's a toilet, sink and a light, was there anything else in the cell? A. Nothing else.

There was a mattress in there when I first came in the hole, they took that out.

Q. Who took it out? A. Sgt. Smith. I don't know if it was exactly him, him or one of the other officers took it out.

Q. At the time you were put in the cell? A. Yes.

Q. You testified you were put in the cell without any clothes on, is that correct? A. No clothes at all.

Q. Mr. McCray, do you recall how long you were in this cell? A. About two days.

Q. At any time during the two-day period did you have clothes to wear? A. No. I got my clothes the day they took me out.

(191) Q. Just before you were taken out? A. Just before I was taken out of the room.

Q. At any time during the period of time when you were in isolated confinement, did you have a mattress? A. Oh, I received a mattress that night, I think it was the officer that came on the next shift, gave me a mattress. He didn't want to give me that until — he didn't give me that until late that night, I think it was, I'm not sure how I got that mattress. I know I got a mattress eventually after complaining quite a bit, and that was the only other item in the cell, other than what I described.

Q. Did you have a mattress for the first night you were there? A. Yes.

Q. Is the isolated confinement area an area where there is — during the period of time when you were in isolated confinement, I assume you could see out of the front of your cell door, is that right? A. Yes.

Q. Did you see any other people during that two-day period in the isolated confinement area, either inmates or guards? A. Oh, constant through there. I mean, every inmate that goes in, is admitted to the south wing area, comes through, and they're shook down, their clothes are taken (192) off and they're assigned to a cell in the south wing, in that area.

Q. During that two-day period, did you witness inmates walking by your cell? A. Yes.

Q. Did you witness Correctional Officers walking by your cell? A. Constantly. That's an avenue for going to the Captain's office, was an avenue for — to the Captain's office at that time.

Q. At any time during that two-day period, Mr. McCray, did you request that you be given clothes to wear? A. Yes, I did. The whole time I was there, every hour, every available opportunity, you know, I would ask for clothes.

Q. Were clothes ever provided? A. Not until I was released.

Q. Do you recall any specific cases when you asked for clothes, or any specific officers or inmates from whom you asked for clothes? A. No. I asked just about every officer that came through there that I thought might be able to ask someone or convince Sgt. Smith, or whatever officer was out at the desk, to give me something to put on.

Q. During the time you were in this cell, Mr. McCray, (193) were you taken out for any purpose? A. No.

Q. During that two-day period, you remained in the cell for the total two days? A. Yes.

Q. Then I assume you did not have a shower during that period of time? A. No, I didn t.

(Mr. Rosenthal) Your Honor please, I have not objected—

(The Court) Yes, you are leading, Counsellor.

(Mr. Rosenthal) Leading terribly.

By Mr. Morgan:

Q. Mr. McCray, during that period of time when you were in the hole, did you have any visits? A. No, no visits.

Q. Did you have with you in your cell during that two-day period any personal belongings? A. None at all.

Q. Did you have any items of personal hygiene? A. None at all.

Q. Did you have a toothbrush? A. No.

Q. Toothpaste? A. No.

(194) Q. Did you have a wash cloth? A. No.

Q. Towel? A. No.

Q. Were you fed during that period of two days, Mr. McCray? A. Yes, I was fed.

Q. Could you describe the manner in which you were fed? A. Well, they brought it down in — they had containers that they put food in, plastic cups. They take all the food, put it in separate plastic cups, you know, that they have, corn flakes, they give you the cereal, they have milk, they give you a milk carton, if they have juice they put it in a plastic cup, if they have soup they put that in a plastic cup, if they have meat they have to put that in a cellophane bag, bread, they hand that to you, you know, the inmate hands that to you, it would be on a tray, he'll hand it to you, you take it off the tray if you want to, this is an inmate brings it to you.

Q. Mr. McCray, the first night you were in the hole, did you sleep on the mattress? A. The first night?

(The Court) You've already asked him that, and he said yes. You're leading him constantly.

(195) (Mr. Morgan) I'm sorry, Your Honor.

(The Court) He said he got the mattress late at night.

By Mr. Morgan:

Q. Mr. McCray, could you describe — well, first of all, Mr. McCray, would you characterize the condition of the cell as either clean or dirty, and if you can characterize it as one or the other, could you explain why you would characterize it in that way?

(Mr. Rosenthal) Your Honor please, I object.

(The Court) Objection sustained.

By Mr. Morgan:

Q. Mr. McCray, do you know an Officer Greenwood? A. Yes, I do.

Q. During the period of time that you were in isolation, did you have an opportunity to talk to Officer Greenwood? A. Yes. He was the Acting Officer, head officer on night shift on the 20th, he was the officer that woke me up for sleeping inside the mattress that particular night.

Yes, I remember him.

Q. You state you were sleeping inside the mattress? A. Yes.

Q. What was the purpose of your sleeping inside the mattress? A. Well, I had no clothes on, it was cold, I laid on (196) the mattress as long as I could, and I've got a complex laying out on mattresses nude, anyway, down there, and it got so cold in that hole until I had no choice but to resort to the only method of getting warm that I possibly could, since all my requests for clothes were denied.

I tore the mattress open, it was a rotten mattress anyway, and I stuck my finger in one of the big holes it had, dug a channel down in between the cotton, and I went to sleep.

As a result of that, Officer Greenwood came and he didn't say anything to me, but he came, opened the door and saw me in there, and the next day I got a ticket for destroying a mattress.

Q. Did you have an adjustment team hearing? A. Yes.

Q. As a result of that? A. Yes.

Q. Were you found guilty or not guilty?

(Mr. Rosenthal) I object, Your Honor, I don't know if there's any relevancy.

(The Court) Yes.

Objection sustained.

By Mr. Morgan:

Q. Mr. McCray, during the period of time that you were in the cell for two days, what did you do to occupy yourself, (197) how did you spend your time?

(Mr. Rosenthal) Again, Your Honor, I'm not sure of the relevancy, and we would voice an objection.

(Mr. Morgan) Your Honor, the relevancy of this question is, we're suggesting and we're alleging that the conditions of this type, segregated confinement, is in violation of the Eighth Amendment, the Eighth Amendment deals with physical inflictions of punishment as well as mental inflictions of punishment and I think we can show—

(The Court) All right, I'll permit the question. Go on.

Objection overruled.

By Mr. Morgan:

Q. Mr. McCray, during that period of time, how did you occupy yourself, how did you spend your time in the cell? A. Well, walking the floor, try to keep my mind off being in the hole, that's one important thing I tried to do, I might try to do some exercises, think about the past, think about my case, but if an officer come through, might try to strike up a conversation, if he would stand still long enough, or an inmate come through, try to talk to him, just try to keep my mind off the conditions that I was under, you know.

Q. Did you have any reading material? (198) A. Well, this particular time, I didn't try to talk to

anybody because I was in the nude and I didn't particularly want to be standing talking to anybody, but that's the usual thing I do when I'm in the hole.

Q. Did you have any reading materials with you? A. Oh, no, none at all, didn't allow it.

(Mr. Morgan) I don't have any other questions.

Thank you, Mr. McCray.

CROSS EXAMINATION

By Mr. Rosenthal:

Q. Now, Mr. McCray, at the time you were on the street side, which tier were you on, if you recall? A. The second tier.

Q. The second tier.

And you do acknowledge the fact that you were hollering, is that correct? A. Yes. Not — on the street side?

Q. Yes, sir.

When you first started hollering for your books and— A. No; on the street side, I was hollering to get out of the cell with the lice in it.

Q. All right. A. At that time, to tell the officer, that was the cell with lice in it, is when I started.

(199) Q. And how long did this hollering go on? A. It didn't go on but a few minutes, the officer came right back to the door and said, we're going to get you out.

Q. Then you were taken, as I understand it, to the fourth tier, yard side? A. I was taken in the hole.

Q. Well, didn't you testify at one time you were on the fourth tier? A. Yes, but that's after the Warden came through and I advised him being in the hole — I mean, being in a cell with lice, and I wanted to be showered and deliced, and he ordered that I was taken out of the hole and given all this treatment and put on the fourth tier, yard side.

Q. You're stating that you went to the fourth tier after you left the isolated cells? A. Yes.

Q. But did you not also testify that at one time you were hollering for your law books and clothing and— A. Yes.

Q. Things of that nature? A. Yes.

Q. Well, where were you at that point? A. I was on the fourth tier, yard — yes, yard side.

(200) Q. Well, that's what I was talking about.

Now, after that hollering, isn't it a fact that that's when you were placed in the isolated confinement cell? A. That's the second time I was placed, as a result of that, yes.

Q. And you acknowledge that there were no other inmates who were in that area who were also hollering and yelling? A. No, nobody else was hollering.

Q. And all the cells in that isolated confinement area are approximately the same size, is that correct? A. Yes.

Q. Prior to this time, had you ever been placed in that area before, the isolated confinement cells, or, as you described, the hole? A. I've been in the hole quite a few times prior to that time.

(The Court) What?

(The Witness) I'm not sure, I'm not sure, but—

(The Court) Now, wait a minute, I didn't get your answer.

What did you ask him?

(Mr. Rosenthal) The question, Your Honor, was whether or not prior to this incident he had ever been placed (201) in the IC area before, the isolated confinement cells, and Mr. McCray's answer—

(The Court) Well, let him answer it.

(Mr. Rosenthal) Okay.

By Mr. Rosenthal:

Q. The answer was, Mr. McCray? A. I'm not sure, it's a possibility.

Q. There is a possibility? A. Yes, there's a possibility, I wouldn't say no or yes.

(The Court) You mean you never had been in the isolated area before this, you never had been in the hole before this time?

(The Witness) What date was this?

(Mr. Rosenthal) '71.

(The Witness) '71.

It's a possibility I wasn't in there before then.

(The Court) Why?

(The Witness) Because I was transferred from Patuxent in May of '71, I think it was, and I think that was my first time in, in the hole.

By Mr. Rosenthal:

Q. But you have been there, thereafter, is that correct? A. Yes, I have, after that.

(202) Q. And there is a possibility that you had been there prior to this November of 1971, is that correct? A. It's a possibility, but I can't recall.

Q. Now, isn't it standard operating procedure that when an inmate is placed in the IC area that he is stripped of his clothing?

(Mr. Morgan) I object, Your Honor. I don't think Mr. McCray is in a position to testify about standard operating procedure.

(Mr. Rosenthal) I'll relate it only to Mr. McCray.

(The Court) Sir?

(Mr. Rosenthal) I'll relate it only to Mr. McCray.

(The Court) All right.

By Mr. Rosenthal:

Q. Mr. McCray, on the other times that you have been placed in the IC area, isn't it a fact that you were stripped of your clothing? A. My clothes were taken, yes, and when I say stripped of my clothing, the clothing that you wear, when you go in there, your regular Penitentiary clothes, and then they give you a

jump suit, and when I refer to clothing I mean whatever I have on at that particular time.

Q. So that you did have a jump suit, or did you have a jump suit? A. When are you talking about?

(203) Q. On the time that you were placed in the IC area? A. I have a jump suit — not when I was placed in the IC area, but I had a jump suit when I came off south wing down to the IC area.

Q. Now, the wooden door that you alleged was closed—

(The Court) Now, wait a minute, I don't quite understand that.

He had a jump suit when he went down to the IC area, and they took that off and you didn't have anything on?

(The Witness) Nothing, they put me in the cell nude.

By Mr. Rosenthal:

Q. And this is the same procedure, though, with reference to yourself, that is followed when you have been placed in the IC area—

(Mr. Morgan) Excuse me.

I object to that, Your Honor.

I think any occasions of Mr. McCray having been in the IC area and what procedures might have been followed subsequent to this event would be irrelevant here.

If he can testify as of the time, that that was what he had had happen to him before, then that would be relevant, I think, but anything since then I think would be irrelevant.

(204) (The Court) Well, he doesn't know whether he was in there before, or whether he wasn't there before. He has been over, in Patuxent, since May, and this is November, and he says he possibly could have been in there, and the question was, when you went in before, or when you went in after, what was happening.

I'll permit the question.

Objection overruled.

Go on, ask him again, Counsellor.

By Mr. Rosenthal:

Q. Mr. McCray, the time that you might have been placed in the IC area prior to November, 1971, and— A. I might have been?

I don't understand that.

(Mr. Morgan) I object, Your Honor, he can't testify about something that happened at a time that might not have happened.

(The Court) Well—

(Mr. Rosenthal) Let me finish the question.

(The Court) All the times that he has been in there with the exception of this time, he can testify to.

(Mr. Morgan) Your Honor, I think—

(The Court) Ask him that question, Counsellor.

(Mr. Morgan) Your Honor, I think that if the State has a specific time in mind, that they could direct Mr. McCray's (205) attention to that and ask him what happened on that specific occasion, but these generalized questions are rather difficult for the witness to handle.

(The Court) Well, I'll permit the question.

Objection overruled.

By Mr. Rosenthal:

Q. The times that you have been placed in the IC area, have you been placed in that area without clothing? A. This was the only time I was placed there without clothing.

Q. What, if anything, happened the second day that you were in this cell, do you recall? A. The second day, nothing.

Q. Isn't it a fact that you smeared the walls of the cell with some fecal matter? A. No, it's not.

Q. Isn't it a fact that you smeared yourself—

(The Court) Wait a minute.

(Mr. Morgan) Your Honor, I object to these questions, unless the State can proffer now that they have some basis for these questions.

(Mr. Rosenthal) We will—

(The Court) Counsellor, this is cross-examination.

(Mr. Morgan) I understand that, Your Honor, but they can't just testify to some event that may or may not have (206) occurred.

(The Court) Well, Counsel, he is testing his credibility and he certainly can do that.

(Mr. Morgan) Your Honor, they can't make up fact situations.

(The Court) Sir, I will tell you that this Court is a court of law and I rule on evidence and I rule on what cross-examination might be employed in this court, and, certainly, they can test his credibility and that's exactly what they're trying to do.

Objection overruled.

By Mr. Rosenthal:

Q. Now— A. When you refer—

(The Court) What happened the second day.

All right, you said you didn't know what happened the second day, right?

(The Witness) No, I don't.

(The Court) What?

(The Witness) Nothing happened the second day that I can recall.

(The Court) All right.

(The Witness) Except for me just being in the cell.

(The Court) All right.

(207) By Mr. Rosenthal:

Q. Do you recall Sgt. Smith coming down the second day? A. Yes, yes.

Q. And you have already denied that you placed any or spread any fecal matter on the walls of the cell.

Did you place any upon yourself? A. No, I don't, never.

Q. Were you given a shower the second day? A. No, no.

(Mr. Rosenthal) One second.

By Mr. Rosenthal:

Q. Now, you testified, I believe, Mr. McCray, that the wooden door was at one time closed for a few seconds, is that correct? A. Yes.

Q. And did I understand you to say that it was the water that — I think your words were that the impact of the water is what closed the door? A. No. The impact of the water, I jumped back from the door.

Q. I see. A. And that's what—

Q. Do you remember the other officer that took you from the fourth tier down to the IC area? (208) A. Officer Baylor.

(The Court) How do you spell that, do you know, Mr. McCray?

(The Witness) B-a-y-l-o-r.

By Mr. Rosenthal:

Q. Now, Mr. McCray, did you at any time threaten to do bodily harm to yourself when you were taken down to the IC area? A. No.

(Mr. Rosenthal) Your Honor please, that would be the only questions we would have with reference to Sgt. Smith, unless this would be an appropriate time to place him—

(The Court) Well, he's on cross-examination, Counsellor.

(Mr. Rosenthal) Very well, Your Honor.

(The Court) All right.

Well, whatever you want to place in evidence by him, you can do, if you've got something and he knows about it.

By Mr. Rosenthal:

Q. Now, Mr. McCray, do you recall filing any cases with the Inmate Grievance Commission? A. Yes.

Q. Do you remember how many you filed? (209) A. Not exactly how many, no, I assume about three or four.

Q. And of the four that you filed, do you remember the results? A. Yes.

Q. Well, let me ask you this, if I may.

You filed a claim on May 7, 1971, allegedly you had been assaulted, is that correct? A. May 7, 1971?

Q. Yes, that there had been an assault on your life on May 7, 1971? A. Probably, yes.

(The Court) What?

(The Witness) Probably did, I can't remember, so many incidents that happened to me in the past year, I would—

By Mr. Rosenthal:

Q. Now—

I'm sorry. A. I would assume, you have it there, that I did file it.

Q. And do you recall that you filed IGC Number 1196 claiming that the sentence imposed upon you by the adjustment team was unfair? A. Yes, I did file that, yes.

(The Court) Sentence imposed by whom?

(210) (Mr. Rosenthal) The adjustment team, Your Honor, was unfair.

By Mr. Rosenthal:

Q. Do you recall also in that case the order that came down stating that certain items were to be reimbursed to you and that whenever there was a search, there was supposed to be two officers? A. Yes.

Q. And you received a copy of that order, is that correct? A. Yes.

Q. Now, did you also file IGC Number 1456 with reference to receiving inadequate medical care?

(The Court) Inadequate, what?

(Mr. Rosenthal) Medical care, Your Honor.

(The Witness) Yes, I did.

By Mr. Rosenthal:

Q. And is it correct that you voluntarily withdrew that complaint? A. No, I cannot recall withdrawing the case, complaint, it's not my way of doing things.

Maybe you can refresh my memory.

Q. I'll try to get that record.

And then you filed a complaint with the Inmate Grievance Commission that your mail and your law books and (211) typewriter had been seized and confiscated? A. Yes.

(The Court) Well, now, when did he file that?

(Mr. Rosenthal) There's not a date here, Your Honor, but it would have to be rather recent, because of the Number 1549, counsel will obtain for the Court and the witnesses the date upon which that was filed.

By Mr. Rosenthal:

Q. Now, with reference to that case, Mr. McCray— A. What was that?

Q. Sir? A. 1549?

Q. 1549, yes, sir. A. Yes, sir, I remember that one.

Q. Right.

Now, you received from the Inmate Grievance Commission on February 6, 1973, with reference to that case, an order holding that your claim was without merit, is that correct? A. Yes, I did.

Q. And are you familiar with the Inmate Grievance Commission Information to Inmates Form? A. Let's see this.

(Handed.)

A. What was that?

(212) Yes, I'm familiar with it. I make it a point to try to keep up on it, you know, in the institution.

Q. As a matter of fact, you received a copy of this, is that correct? A. I didn't receive a copy of it, but I'm familiar with it.

Q. You are familiar with it? A. Yes.

Q. Did you take any appeal when you received from the Inmate Grievance Commission—

(The Court) Sir?

Wait a minute, what did you say?

(Mr. Rosenthal) Did he take an appeal.

(The Court) Okay.

By Mr. Rosenthal:

Q. Pursuant to the information inmate sheet, setting forth the law on the Inmate Grievance Commission, when you received on February 6, 1973, notice that Claim IGC 1549 was held to be without merit? A. Did I appeal?

Q. Yes. A. I may have, I don't know.

Q. Well, isn't it a fact that you did not appeal it? A. No, I didn't appeal it.

See, I appeal so many cases, when you ask me, did (213) I appeal this or did I appeal that, I'm quite sure the Court knows that I appeals, and I just can't come out and say, I didn't appeal this case or that case.

(Mr. Rosenthal) I have no further questions, Your Honor.

(Mr. Morgan) We have nothing else.

Thank you, Mr. McCray.

(The Court) Well, as you say, you appealed everything, why didn't you appeal this?

(The Witness) To tell the truth, Your Honor, the Inmate Grievance Committee advises a man that he can appeal, but I just don't know exactly what and how to appeal that particular case.

(The Court) Well, now, listen, you've got—

(The Witness) Yes.

(The Court) —cases in the Circuit Court—

(The Witness) I understand.

(The Court) —the state court, you've got them over here, and you appeal everything, it's amazing that you didn't appeal, I'm just commenting on it, I don't understand it.

(The Witness) This is the whole thing, I'm familiar with how to appeal from other convictions, but this is a new thing, I don't know what to take, or what to appeal for something, if I intend to appeal. I don't know if I intend to (214) appeal, I'm not suggesting by that statement that I intend to appeal, but if I did—

(The Court) Did you get your property back, did you get your typewriter and law books back?

(The Witness) No, I did not.

(The Court) They found the claim was not meritorious, right?

(Mr. Rosenthal) That's correct, Your Honor.

(The Witness) This was not — oh, I'll tell you why I didn't appeal.

At the Inmate Grievance Committee, they would not hear the contention about the loss of the typewriter, et cetera, because it was pending before this court, that's the reason they gave me.

(The Court) Pending before this court?

(The Witness) Yes.

That's the reason they gave me.

(The Court) Why don't I remand it back there?

(Mr. Rosenthal) We would have no objection to that, Your Honor, so they could have a hearing, factual determination.

(The Court) All right, that's the only reason they didn't hear it?

(The Witness) That's the reason why they didn't hear it, that's the reason I didn't appeal that decision, they (215) say they don't have jurisdiction.

(The Court) What number is that?

(Mr. Rosenthal) That number—

(The Court) Yes.

(Mr. Rosenthal) Your Honor, I'd have to do some research to determine that.

(The Court) Well, find the number, and send it back over there, with this opinion, okay; do you have any others like that, that should go back?

(Mr. Rosenthal) Again, Your Honor, we would have to review his files.

(The Court) Okay.

(Mr. Rosenthal) Counsel does have one more question, Your Honor, if I may.

(The Court) Sure.

By Mr. Rosenthal:

Q. Mr. McCray, the claim that the Inmate Grievance Commission found to be meritorious— A. Yes.

Q. —do you recall someone from the institution, or the Inmate Grievance Commission, asking you to submit the value of the items that were found to have been lost? A. No, I don't. I've been trying — I've approached Captain — what's his name — well, one of the Captains, I've approached Major Mills on numerous occasions about it, and (216) they said that it's not in their hands, it's out of their jurisdiction, and it takes an Act of Congress to see the Warden in the institution.

So, I don't know, you can write him, I've written letters, I think you might have copies of letters I've written, concerning the property, and it just hasn't been honored, it's as simple as that.

I, for one, definitely want to be given compensation for that property, and I would be glad if somebody would take an interest.

(Mr. Rosenthal) No further questions, Your Honor.

(The Court) All right, make sure that they get a letter telling them how much the property is worth, will you, they've asked for it, Mr. Morgan.

(Mr. Morgan) Yes, Your Honor.

(The Court) All right.

(Mr. Morgan) I'm sorry, I didn't hear the question.

(The Court) I say, make sure they get a letter setting out how much the property is worth.

(Mr. Morgan) Yes, Your Honor, we will.

(The Court) All right.

Okay.

(Mr. Morgan) Your Honor, we have nothing further on the Plaintiff's side.

(The Clerk) Step down.

(217) (The Court) All right.

(Mr. Rosenthal) Well, if Your Honor please, we would move for motion to dismiss as far as Sgt., now Lt. Smith, is concerned; I don't believe that there is really anything that has been presented by Mr. McCray to show any cruel and unhuman punishment under the circumstances that exist in the instant case.

(Mr. Morgan) Your Honor, in response to that, I think Haines, which is 92 S. Ct., a 1972 case, disposes of the State's claim.

The factual allegations that were made by the prisoner there are almost identical to the factual allegations we're making in this complaint, Eighth Amendment and Fourteenth Amendment violations.

There are numerous lower court cases that have awarded relief, damage relief, to prisoners based on both Eighth and Fourteenth Amendment claims, included among which are Anderson versus Nausser, United States, ex rel Wolfe versus Neale, for example, Wright versus McMann, Sostre versus McGinnis.

We would feel that a motion to dismiss at this time for the Defendants would be inappropriate.

(The Court) Motion denied.

Proceed with your case.

(Mr. Rosenthal) Yes, we would call Lt. Smith to the (218) stand.

LT. BERNARD DAVID SMITH,

a Defendant, was called as a witness for and on behalf of the Defendants, and, having been first duly sworn, testified as follows:

(The Clerk) State your name, sir.

(The Witness) Bernard David Smith.

(The Clerk) What is your first name?

(The Witness) Bernard.

(The Clerk) Thank you.

DIRECT EXAMINATION

By Mr. Rosenthal:

Q. Mr. Smith, what is your occupation? A. I'm a Correctional Officer Number Four.

(The Court) Correctional Officer, what?

(The Witness) Four.

By Mr. Rosenthal:

Q. And to which institution are you presently assigned? A. Maryland Penitentiary.

Q. And were you there in November of 1971? A. I was.

Q. Now, how old are you, sir? A. 35.

Q. And have you finished high school? (219) A. I finished high school and I have an Associate of Arts Degree in Law Enforcement.

Q. And from where did you obtain this degree? A. Community College of Baltimore.

Q. Now, how long have you been assigned to the Maryland Penitentiary? A. I came to the Maryland Pentientiary in February, 1964.

Q. And prior to that, what was your employment? A. I was a Correctional Officer, still, but I was working in the House of Correction.

Q. And for how many years total have you been a Correctional Officer? A. 12 years and eight months.

Q. Now, you are familiar with Mr. McCray? A. Very well so.

Q. And are you also familiar with the incident to which he refers? A. Correct.

Q. Now, what was your duty assignment at the Maryland Penitentiary in November of 1971? A. I was a Sergeant in charge of the south wing, which is the segregation area for all the penal institutions in the State of Maryland.

(The Court) Sergeant in charge of what?

(220) (The Witness) South wing, which is the segregation area for penal institutions of the State of Maryland, the main segregation area.

By Mr. Rosenthal:

Q. Now, do you recall on November 19, 1971, where Mr. McCray was assigned? A. Right.

Q. Where was he assigned? A. He was assigned to the south wing.

Q. And do you recall what tier, or cell? A. Yes, I do.

See, that day was the first time I ever met him and for some reason he was supposed to be locked up in the south wing and I put him on the fourth tier, street side, the particular cell I don't remember.

Q. Was there any particular reason why he was placed street side? A. No, it's a cell like any other cell and it was an available cell, which everything was operating in it, I mean by that, the toilet, light fixture, sink, and it had bedding, and so forth, in it, this is the reason why I placed him in that cell.

Q. All right, and then what, if anything happened? A. Well, after he got up there for a while, he started screaming, you know, real loud, as a matter of fact I never (221) heard a man scream this loud before, so I thought I better go up myself to find what the problem was.

Well, when he started screaming, it seemed as though a lot of the other inmates in this area, maybe they knew

him, or something, they didn't get along with him, and it was causing a disturbance, they were telling me I better get him off that cell, off this tier, because they didn't want to be involved in all this noise, they couldn't sit and concentrate or talk with their buddies with him raising all this ruckus up there.

This is the reason why I transferred him off that tier.

Q. And which tier did you take him to? A. I took him around the other side of the fourth tier, yard side.

Q. Now, when you refer to street side and yard side, would you describe this a little clearly? A. Well, street side is facing Forrest Street, Greenmount Avenue area, you know, the people walking up and down the street can hear the noise real loud. If I put him on the other side, well, the noise would go into the compound, that's facing the yard area.

Q. Now, when you say facing, are you talking about the cell door, the window, or— A. The cell door.

(222) You see, at this particular time on the street side, the windows was just like windows like that, you know, they weren't covered, or anything like that, and the noise would carry on out to the street.

Q. Now, what, if anything, took place after you placed him on the fourth tier, yard side? A. Well, when I placed him on the fourth tier, yard side, he deliberately tore off a locker off the wall.

(The Court) What?

(The Witness) A locker.

In each cell, we also have a wall locker, on the wall, and this he was using to bang against the cell wall, on the next cell, and he was hitting on the floor, banging, and he had torn up the mattress, and everything.

All right, I went back up on the tier, and at this time was the time for feed-up, it was around 11:30 in the day, and it was causing disturbance on the other side.

So, I decided to bring him downstairs, this is when I put him in the IC area.

By Mr. Rosenthal:

Q. And was any — did anyone help you to take him to the IC area? A. Well, there's a standard rule, we always have another officer with us when we open the door, so I did have another officer with me.

(223) Q. Would that be Officer Baylor? A. I don't recall, Baylor or Hendricks, it was one of the two.

Q. All right.

Now, what transpired when you went down to the isolated cell area? A. Well, we went down to the isolated cell area, what I did, I handcuffed him, and he walked of his own free will, nobody carried him anywhere, and he was talking, you know, like he was going to do harm to himself, tear this up and hurt himself, so the first thing got into my mind, I say, well, if he hurts himself it won't be caused by my negligence, so this is when I stripped him.

Q. And what, if anything, did you remove from the cell? A. At that time, I removed his mattress, all his clothes. Well, it's a policy when you take a man down to strip search him anyway, but I didn't give him his coveralls back, because he was talking about doing harm to himself, and the only thing that he had in his cell at that particular time was a toilet and the sink.

He had a light in the cell, it's recessed in the wall whereas he can't get to it to break the bulb to cut himself with the glass.

Q. Now, why did you remove the mattress? (224) A. Well, I've seen inmates take a mattress and tear it up into strips and make a rope out of it and use it to hang himself.

I'm not saying that he would hang himself, but it has happened, you know.

Q. So, you took the mattress and clothes for what reasons? A. For reasons he wouldn't do harm to himself.

See, at this time, I didn't know him very well, this was almost — I had just met him really that day, so I

didn't know what type of personality or attitude he was, you know.

Q. Did you return the next day when you went on duty? A. The next day I did return and, actually, when they put a man in IC, you have an officer in that area to check him every half hour, and the next day I did return and take a look at him in the morning, always do this myself.

Q. Which shift were you working? A. 8:00 to 4:00.

Q. 8:00 in the morning to 4:00 in the afternoon? A. Right.

Q. And when you went back to check on Mr. McCray, what, if anything, did you discover? A. When I went back to check on this particular (225) inmate, actually, when I went into the IC area, you know, the smell was unbearable.

What he had done, he had defecated into a cup and then smeared it all over himself and all over the cell wall, and he had even wrote a name up there, his nickname is Black Hawk, and he wrote this with this human waste on the wall.

So, right away, I said to myself, I can't put him back up on the cellblock when he's in that position he's in now. This is when I got hold of Mr. Musk, he was the psychologist who comes over to the south wing.

After that, I had to shower him right away, and I had two tier runners, and the tier runner is an inmate who works in the area, to scrub the cell around.

Q. And was Mr. McCray kept on isolation? A. He was still in isolation.

Q. And do you recall when he was taken back to the south wing? A. I think he stayed there two days and he started acting all right, and I put him back up on the tier, the third tier, I believe I put him on, 325 I believe it was, that's on the yard side, also.

Q. Now, at any time did you throw water on Mr. McCray? A. Never did.

Q. At any time did you drag him down the steps? A. He walked of his own free will.

(226) Q. Well, what is the — strike that, please.

(Mr. Rosenthal) Your witness, Counsel.

CROSS EXAMINATION

By Mr. Morgan:

Q. Lt. Smith, this incident that you described as the second day, that would have been November 21st, 1971, when you went into the cell area, isolated area, and found fecal matter spread on the walls? A. I'm not sure what day it was, but it was the next day after he came into the isolation cell.

Q. You're absolutely sure that this was during the same period of time? A. Yes.

Q. Mr. McCray has been in the isolated confinement cell numerous occasions, hasn't he? A. Right.

Q. To your knowledge? A. Yes.

Q. But you're absolutely sure that this particular incident that you're describing occurred on November 20th, or November 21st, rather, 1971, and it did not occur at some later time? A. It occurred right after that, the second day.

Q. You're absolutely sure of that? A. Right.

(227) Q. Did you write up a report on that? A. I should have, I'm not sure, because sometimes everything happens at the same time and you don't get a chance to write reports, but, actually, he wasn't doing anything to harm anybody and I probably didn't bring that to any priority, because I think I was locking up some more people at that time.

Q. Did you write up a disciplinary report on the spreading fecal matter on the walls? A. That's what I'm talking about.

You see, him spreading this matter — I could have done it, but him spreading this matter on the walls wasn't harming anybody, it wasn't a security risk, it was just him, it was his matter, see, so no other person got involved in it.

Q. Did you make a record of that in the south wing log book? A. I might have. I had to call Mr. Musk, I had to make sure the psychologist came over the same day.

Q. Would you have made a notation in the log book of those things? A. I should do it, I might have done it, I'm not sure.

Q. If Dr. Musk had visited Mr. McCray in isolated confinement, would there have been a record of that in the south (228) wing log book? A. He makes his own records.

Q. There would have been no record of that in the south wing book? A. Usually, he comes over at random, he comes over a day, maybe two or three days from now, maybe two or three days in a row.

Q. Okay.

Now, can you identify this, Sgt. Smith, is this the south wing log book? A. That's one of them, there's more than one.

Q. Well, referring you to Page 194, at the top of the page, it's dated 11/20/71, 8:00 to 4:00 shift. A. Yes.

Q. Would that be what had occurred on that day? A. If it's written in here, everything that happens is not written in here.

Q. Is it normally your practice to write down disturbances that occur in south wing? A. We try to, it depends. You see, sometimes there could be a major disturbance happen some place else, most of the officers have to leave one area and go where the excitement is at, and some things never get down.

Q. Well, on this particular day, November 20, 1971, do you see any notation there written by yourself, or anyone (229) else, of any disturbance occurring on south wing? A. No.

As a matter of fact, that's not my handwriting, that's the clerk.

Q. Do you see anything there referring to Milton McCray on November 20? A. No.

Q. There's no notation here of Milton McCray participating in a disturbance, is there, or causing a disturbance? A. No, I didn't say he participated in a disturbance. The disturbance he was involved in was his own.

Q. Well, you testified that when he was in his cell on the third or fourth tier, yard side— A. Right.

Q. —that he was banging on his cell walls? A. That's the reason why he was taken out of the cell.

Q. Yelling out the door, causing a disturbance? A. Right, that was his disturbance, nobody else joined in.

Q. Oh, I see.

Well, under those circumstances, why was it necessary to take him out of his cell and put him in isolated confinement? (230) A. Because if he stayed in that area there, causing this noise, then I would have a chain reaction and the other inmates may have joined in and I would have really had a major disturbance.

In this case, I was dealing with one man, so, to me, security wise, better to deal with one than twenty.

Q. It could have caused a disturbance, but at the time when you moved him there was none? A. Right.

But even the inmates was yelling to move him.

Q. Lt. Smith, I show you the entries on the 8:00 to 4:00 shift, November 21st, 1971, which would have been the next day, and I ask if there is anything there that indicates anything about the Plaintiff, Mr. McCray? A. Nothing in here.

Q. There's nothing written there about his having spread fecal matter on the walls of his cell? A. No, but I don't think he would deny it.

Q. Going back to the original incident, not the incident you say occurred in the isolated confinement area, this creating a disturbance incident.

Did you write up a disciplinary report on McCray for that and submit it to the adjustment team for their disposition? A. I'm not positive, I believe I did, but I'm not (231) positive.

I know every time I move a man from a wing to an isolated cell, I have to get it approved by a Captain, or above.

Q. Right. A. To document it.

You just can't put an inmate in isolation on your own free will.

Q. Right.

Well, what I'm asking, Lt. Smith, is not whether you got approval from the Captain, but whether or not you wrote up a disciplinary ticket on Mr. McCray for a violation of prison rules? A. I should have.

Q. Do you recall whether or not you did? A. Well, I'm not positive of that.

Q. Do you have any records here today that would indicate that you did? A. No, I didn't bring any records.

Q. All right, if you wrote such a report, I assume it would be in Mr. McCray's file? A. It should be in his folder.

Q. Do you recall, Lt. Smith, going to an adjustment team, or a disciplinary hearing in this case, perhaps that would refresh your memory? (232) A. Well, his cases, I never went to one of the hearings.

Q. You don't recall testifying before an adjustment board about creating a disturbance? A. Well, if I wrote him up, I wouldn't have to go there and testify, what I put on paper should be sufficient.

Q. Lt. Smith, if you see a violation in the institution, I assume it is your practice to write up a disciplinary ticket? A. Right.

Q. Sgt. Smith, could you describe the isolated confinement area physically? A. Well, it's—

(Mr. Rosenthal) Your Honor, I object, unless counsel is going to lead into something other than what Mr. McCray said.

(Mr. Morgan) Well, Your Honor, we feel that this is important for corroboration of what Mr. McCray said.

(The Court) Well, I'll permit it.

By Mr. Morgan:

Q. Would you describe for us briefly, Lt. Smith, the isolated confinement area, the cells, what's in the cells, how large they are, and the doors? A. Well, the isolation area had six cells, and I guess the cells are, maybe, about, maybe ten by five, or ten by (233) seven feet, I'm just guessing now.

They have a toilet and a sink, which are two separate units. They have a light which is recessed at the back of the cell, behind a thick glass which cannot be broken.

Water can be turned off in the back of the cell, you know, just in case, maybe, the inmate starts flooding, and it has a — maybe about as high as this first step here, the same size the mattress is, and the mattress goes on top of it.

The walls are made out of cement, so is the ceiling. And then you have a grill door with maybe a twelve inch opening in it by three and a half inches high for food to be passed in to the inmate; and then you have a solid wooden door on the front of that, which has a peephole that you can — if the door happened to be closed and locked, you can look and see how the inmate is doing.

There's a storeroom officer back there at all times who takes the inventory of property when the man comes in that area.

You see, we use that area, also, for incoming inmates, to search and check them down, strip search.

Q. Sgt. Smith, can you identify this piece of paper — or Lt. Smith? A. Ahuh. This is — we use something similar to this, (234) not exactly like this. This writing on here is done by the clerk, that's his handwriting.

Q. Which clerk is that? A. His name—

Q. No, I mean, where is he stationed in the institution? A. Stationed at the desk.

Q. South wing desk? A. Yes, in the IC area.

Q. I see.

Is this a report that was made by him on the day that Mr. McCray was put into IC? A. It looks to me like his writing, but we don't use this kind of — a different kind of paper.

Q. Well, this is a Xerox copy.

Did you use it at that time? A. We don't have a form made up like this at all.

Q. You've never seen this form before? A. Not this particular form here.

We have a long yellow form.

Q. You are aware of these forms being used— A. Not them, not that—

Q. You've never seen these forms in the south wing? A. Not that particular kind of form, no. We have a long yellow form, and I'll show it to you any time you come (235) over to the Penitentiary.

Q. Where do you think I got this? A. Well, I don't know where you got it at, but I notice you have Cell 232 on that.

(The Court) What about that?

(The Witness) That's protective custody tier, and this is not a protective custody man, I know that.

By Mr. Morgan:

Q. Sgt. Smith, can you identify this book, and, specifically, this page?

(The Court) What is the number of it, Counsellor?

Has it got a number?

By Mr. Morgan:

Q. This is Page 41 of what book, Sgt. Smith? A. That's my writing.

Q. Is this your writing at the bottom? A. Yes, that's mine.

Q. Can you read what it says? A. It says, McCray had a shower today, also put in—

(The Court) What?

(The Witness) It says, Milton McCray had a shower today, and this is the 20th, also put in IC5 at 1:00 p.m.

(The Court) Wait a minute, had a shower today, and also, what?

(The Witness) Put in IC5 at 1:00 p.m.

(236) By Mr. Morgan:

Q. And this is Page 41 of what book? A. The log book, south wing desk.

(Mr. Morgan) Your Honor, the Plaintiff would move to admit this book, or this page.

(The Court) Well, why don't you all Xerox it and get it back to him.

(Mr. Morgan) Fine.

(The Court) All right?

(Mr. Morgan) Yes, Your Honor.

(The Court) All right.

Let me see it, would you please?

(Handed.)

(The Court) This shows 11/20/71, Saturday. Right, had shower today, also put in IC Number 5, what's IC Number 5?

(The Witness) That's a punitive cell, which he was referring to as the hole.

(The Court) Oh.

By Mr. Morgan:

Q. Sgt. Smith, are you familiar with the isolated confinement log book? A. May I see that, too?

(Handed.)

(237) By Mr. Morgan:

Q. These are Xerox copies of pages from that book, can you identify them, can you identify them as Xerox copies of pages from that book? A. Ahuh.

Q. This is Page 9 of the isolated confinement log book, Your Honor; and specifically directing your

attention to November 20th, 1971, 8:00 to 4:00 shift.? A. Ahuh.

Q. What does it indicate there with regard to Isolation Cell Number 5? A. It says, IC Number 5, 110563, Milton McCray. He was housed in the particular cell this particular date.

Q. And that's your signature? A. That's my signature.

Q. Can you read the next entry? A. Down here?

Q. Yes.

Can you read the date and the shift and also the entry? A. It says — well, the date I can't make out, but it says, check IC area, found all three inmates doing okay. 9:00 o'clock, Milton McCray—

(The Court) 9:00 p.m., or what?

(The Witness) a.m., it should be. I guess it's a.m.

(238) I think this is the 4:00 to 12:00 log here, splitted his mattress and crawled between the cotton lining.

I think the 4:00 to 12:00 officer put this on, this is not my writing at all, and this wasn't signed, either.

By Mr. Morgan:

Q. Now, I show you Page 10 of the same book, Sgt. Smith, referring your attention to 11/21/71, the 8:00 to 4:00 shift again.

Again, Milton McCray is indicated in IC Number 5, is that correct? A. Ahuh.

Q. And that's your signature next to it, isn't it? A. No.

That's 12:00 to 8:00 shift — oh, right here, yes.

Q. That's your signature indicating Mr. McCray is in Cell 5? A. Right.

Q. Is there any notation there of any incidents having occurred in Cell Number 5? A. That wouldn't go in this book, all this book specifies is who is in what cell.

Q. In other words, if Mr. McCray had spread defecation on the walls of his cell, it would not appear

in the IC log? A. If he had hung himself, it wouldn't be in this log (239) here.

Q. Well, you've just read an entry where he had split his mattress— A. I didn't put that in there, it shouldn't have been in there. The 4:00 to 12:00 officer put this in there, and nobody signed it.

Q. But as far as your practice is, you would never write anything in this log book except who was in the cell? A. Right.

Q. And your entry indicates that Milton McCray was in the cell on the 20th and 21st? A. Right.

If you keep looking through there, you'll see almost exactly alike.

Q. All right, fine.

(Mr. Morgan) Your Honor, we would also like to introduce these two pages, Pages 9 and 10, and, again, they will have to be Xeroxed.

(The Court) All right, this is going to be number what?

(The Clerk) That's Page 41 of — what log book is this?

(Mr. Rosenthal) The south wing.

(The Clerk) The south wing?

(The Witness) Yes.

(240) (The Clerk) Page 41 of south wing log book will be Plaintiff's Exhibit Number 1.

(Document was marked Plaintiff's Exhibit No. 1.)

(The Court) In this case?

(The Clerk) Yes, sir.

And the other two pages—

(Mr. Morgan) These are from the isolated confinement log book and I would assume that they would be—

(The Clerk) 2A and 2B.

(Documents were marked Plaintiff's Exhibits Nos. 2A and 2B.)

(The Court) 2A and 2B?

(The Clerk) Yes, sir.

(The Court) All right, Counsellor.

By Mr. Morgan:

Q. Lt. Smith, can you identify this? A. Yes, this is the handbook for inmates, which was revised with the blue book that you have there now.

Q. This was in effect in— A. July, '71.

Q. This was in effect in November, 1971, wasn't it? A. When did this last one come out?

Q. The last one came out, I believe, after the riots last summer. (241) A. We'll say it was in effect then.

Q. It was in effect.

Directing your attention specifically, Lt. Smith, to Pages 22 through 30. A. Ahuh.

Q. That sets forth adjustment violations in the institution? A. Right.

Q. Does it not? A. Right.

Q. And on Page 25, various adjustment procedures are set forth, isn't that correct? A. Ahuh.

(Mr. Morgan) Your Honor, we would introduce as Exhibit 3 these Xerox pages from the book which Lt. Smith has identified.

(The Clerk) Marked Plaintiff's Exhibit No. 3.

(Document was marked Plaintiff's Exhibit No. 3.)

By Mr. Morgan:

Q. Those pages provide the procedure for disciplinary hearings in the institution, don't they, Lt. Smith? A. Supposed to.

Q. Can you identify this, Lt. Smith? A. Ahuh.

(242) Q. Could you explain to the Court what that is? A. This is an Administrative Directive put out by the Deputy Commissioner, James Jordan.

What it does is pointing out that punitive or isolation cells will be used only when an inmate is emotionally disruptive, and used for a cooling off period, and it can be enforced from one hour up to the time the inmate is reasonably calm enough to go to a segregation area.

So, I mean, that could be one hour to 90 hours, depends upon the inmate.

Q. Directing your attention to the last paragraph where it states:

The psychologist/psychiatrist should be contacted immediately after the confinement of the inmate, and the inmate should be evaluated within a twenty-four hour period. A. Right.

Q. My question is, first, in this particular case, did you within 24 hours of 1:00 o'clock on 11/20/71 contact a psychologist or a psychiatrist and inform him or her that Milton McCray was in isolation? A. I explained to you not long ago that after the human waste, I called the next morning, it was less than 24 hours.

Q. And at that time, the inmate was evaluated? A. Whatever he did, I don't know what he did, he went (243) back there, talked to him.

Q. You're absolutely sure that on this particular occasion, Milton McCray spread his own waste in that cell? A. Well, he was the only one in there at that time, so I imagine it would have to be him.

Q. Couldn't have been a different time? A. Well, when he went in the cell, there wasn't any waste on the walls and there wasn't on him, so where it came from, I don't know.

(Mr. Morgan) We will introduce this, Your Honor, we would move to introduce this as Plaintiff's Exhibit Number 4, I think.

(The Clerk) A Xerox copy.

(Mr. Morgan) This is a Xerox copy of the Administrative Directive.

(Document was marked Plaintiff's Exhibit No. 4.)

By Mr. Morgan:

Q. Mr. Smith, or Lt. Smith, I'm sorry, during this period of time when you were Sergeant in charge of the south wing area, did you have the authority to place an inmate in the isolated confinement area? A. Right, I then notified my immediate supervisor.

(The Court) Wait a minute, excuse me.

What did you say?

(244) (The Witness) I said, yes, and then I notified my immediate supervisor.

By Mr. Morgan:

Q. Are there any written policies or regulations of the south wing that indicate how long a person is to be kept in isolated confinement? A. I think you just showed me that, didn't you?

Q. That policy is a directive of the Division of Correction, my question is whether there are any specific policies of the south wing, internal institutional policies, that govern how long a person is to be kept in the isolated confinement area? A. Well, we only have a verbal thing, that was from word of mouth, that a man shouldn't stay in there for three days.

Q. And was that— A. And with me, I've always had a policy of my own, not to keep a man over but one night, the next day, you know, depends on the man.

Q. Lt. Smith, do you recall testifying in a deposition in this case on June 7th, 1973? A. Right.

Q. I read to you from Page—

(The Court) June the 7th, Counsellor?

(Mr. Morgan) June 7th of 1973, yes, Your Honor.

(245) (The Court) Ahuh.

By Mr. Morgan:

Q. I read to you from Page 11 of that deposition:

Question, do you know how long McCray spent in that confinement at that time?

Answer, I don't know. It's a policy with me, I don't keep a man in there over three days, if I had seen he

was improving I would take him out and put him back up on the cellblock.

Your testimony here today is that it was the institution's policy that a man would not be kept there for three days, but that it was your personal policy that you would not keep a man there more than one day, is that correct? A. Right.

Q. In your deposition, you testified, it was a policy with me, I didn't keep a man in there over three days. A. Depending on the man, and some people, being as you are on the subject, some men, like McCray himself, came back to live in the IC area, he lived there for a matter of months.

(The Court) He did what?

(The Witness) He lived in the IC area.

(The Court) What did he do, what did you say?

(The Witness) Let me explain this to you, Judge.

(246) (Mr. Rosenthal) Lived, Your Honor.

(The Witness) He lived there, Judge.

He lived there, sir. Now, after I got to know Milton McCray pretty well, he always called me and talked to me, so we talked like normal men would talk, and he asked me one day could he come down to the IC area and live there and do his time there, and his, of course, personal belongings, like his law, court papers, which is about four boxes full, so at that time I wasn't up tight for a cell of this type.

(The Court) What?

(The Witness) At this particular time, I didn't need this type cell because I didn't have any problems, so I permitted him to go in there and live, if he wanted to, so this was his choice.

(The Court) Well, this was after this incident, wasn't it?

(The Witness) Right.

I mean, beings we were talking about the area, IC area, the number of days a man stayed there, but on his

own request, if I didn't need a cell and you wanted to live in there, it's perfectly all right with me.

By Mr. Morgan:

Q. Well, on this particular occasion when Mr. McCray requested to live in these cells, did he not also request to live in his cell with a mattress? (247) A. Then he had a mattress, because I just told you a minute ago, we used to talk, he had calmed down enough that he had learned a little about me, I had learned a little about him, so we corresponded like men should.

So, he asked my permission, could he come down to live in the IC area. So, I said, why do you want to live there? He said, I can be away from this noise and I can do my legal work. So, I said, good enough.

So, every morning, down in the area doing his legal work. He asked me for paper and pencil and writing material, which I gave him myself.

Q. Sgt. Smith, on that occasion you're describing, Mr. McCray had his clothes in his cell, didn't he? A. Had his clothes and anything else he might want, right.

Q. In other words, his cell during that period of time was exactly the same as the cell in the south wing, except he was in a different area? A. Right.

Q. Now, the time we're talking about, Mr. McCray was in the cell without any clothes at all, is that correct? A. Correct.

Q. Without a mattress? A. Right.

Q. Without anything else in his cell? (248) Right, because he had displayed himself differently then.

Q. I see.

But on the occasion when Mr. McCray put himself there voluntarily, to get away from the noise— A. That was different.

Q. —he had exactly the same conditions of confinement as had he been on the south wing? A. Right. Maybe a little better.

(The Court) Is that right, Mr. McCray?

(Plaintiff McCray) All except — to a degree.

(The Court) What?

(Plaintiff McCray) To a degree, yes. I mean, as far as the conditions of the cell at that particular time.

I didn't volunteer to go in the hole, that part he's exaggerating on.

(Mr. Morgan) Your Honor, we'll be glad to have Mr. McCray testify.

(The Court) Yes, we'll have him testify to everything he has got.

(Mr. Morgan) Your Honor, in case there's any confusion about this point, we're not challenging these cells per se as a place in which to live, we're merely saying that a person cannot be put in them under the conditions Mr. McCray was put in them.

(249) (The Witness) I would like to say something about that, too.

(Mr. Morgan) Well, Lt. Smith, you have to respond to my questions, if you don't mind.

(The Court) Well, are you going to be a little while?

I think we might as well go to lunch and come back at 2:00.

(Mr. Morgan) I wouldn't expect to be too much longer, Your Honor.

(The Court) Well, I think maybe that's best, and then we'll go on to the other things we have to do.

All right.

(Mr. Morgan) Your Honor, if the Court would have no objection, the Plaintiff would prefer to litigate the Rutherford case on Thursday, if possible. We would prefer to have some time to further discuss that case.

(The Court) What about Burrell?

(Mr. Morgan) Well, Your Honor, I think the Burrell case is not going to take all day Thursday and I think Mr. Rutherford's case—

(The Court) Well, if it does like this, it will, won't it?

(Mr. Morgan) Well, no, Your Honor, I think if we can start at 10:00 o'clock, we'd be finished by the lunch (250) break, in the Burrell case.

(The Court) Is that all right with you, Mr. McCray?

(Plaintiff McCray) I think so.

If he thinks so, I think he's better qualified than I am to decide.

(Mr. Morgan) We would prefer to have that extra day.

(The Court) All right, we'll talk about it when we come back, I can't give my life to Mr. McCray.

(Whereupon, at 1:05 o'clock p.m., a luncheon recess was taken until 2:00 o'clock p.m.)

(251) AFTERNOON SESSION

(Met, pursuant to the taking of the recess, at 2:15 o'clock p.m.)

LT. BERNARD DAVID SMITH,

resumed the witness stand, and, having been previously duly sworn, testified further, as follows:

(The Clerk) Just be seated, Lieutenant, you are still under oath, sir.

CROSS EXAMINATION (Resumed)

(Mr. Morgan) Your Honor, with regard to the case against Mr. Rutherford, Mr. Rosenthal and I talked about it during the break, and I suggested, and I think Mr. Rosenthal has no objection, if we could take that case at 10:00 o'clock on Thursday morning, we feel it would take no more than half an hour to litigate that case, and the Plaintiff would certainly appreciate having that time, if possible.

(Mr. Rosenthal) For the record, Your Honor, Mr. Rutherford is here, we are prepared to go ahead, but subject to whatever the Plaintiff and/or the Court decide.

(The Court) Well, why do you want to take it at that time?

(Mr. Morgan) On Thursday, Your Honor?

Well, quite frankly, Your Honor, the problem has been that we are dealing here with four separate cases.

(252) (The Court) I know that.

(Mr. Morgan) And, quite frankly, we are not as well prepared in the Rutherford case as we would hope to be. I think we could go ahead today because the factual issues are very simple.

(The Court) Just whether he got it or didn't get it, isn't it?

(Mr. Morgan) Well, that's pretty much it, Your Honor, but I think we could do it in a more organized and orderly fashion if we could have the time between now and Thursday morning.

(The Court) How long is the Burrell case going to take?

(Mr. Morgan) Your Honor, in the Burrell case, the Plaintiff would testify and Dr. Gould would testify on his behalf, I don't know what witnesses the Defendant would call.

(Mr. Rosenthal) Your Honor please, we would have the Defendant and a minimum of one additional witness or probably two. I'm not sure we would finish that in one day, Your Honor, to be quite frank with you, and I'm basing that upon the time — of course, we did get a little late start today, but the time this case has taken with just, basically, Plaintiff and the Defendant. If the Plaintiff intends to have the doctor and the Plaintiff, and I know we (253) will have an absolute minimum of two witnesses, I'm reasonably sure the case would probably go over to Friday.

(The Court) Well, Mr. Morgan, what kind of — what are you looking for in the Rutherford case, that you haven't got already?

(Mr. Morgan) Well, Your Honor, I think probably the facts in the case we could stipulate to, Mr. Rosenthal and I, we haven't discussed exactly what records we would stipulate to except that I would think anything in

the court files the Defendants would have no objection to entering as evidence here, and that's pretty much our case.

We have no other evidence, other than Mr. McCray's testimony that he mailed certain petitions in to the court, received certain letters back from the court, but the court files—

(The Court) It only involves one case, doesn't it, that he claims to have mailed in?

(Mr. Morgan) It involves two, I believe, Your Honor, two complaints that were mailed to the court and not docketed.

(Mr. Rosenthal) My recollection was that there was one, Your Honor, from the pleadings, but I may be mistaken, also.

(The Court) Was what?

(Mr. Rosenthal) Just one, if I recall correctly, from the pleadings, there was just one writ or petition that (254) the Plaintiff sent in that he alleges was not properly docketed.

(The Court) Well, why don't we take what testimony we can in that case today, Mr. Rutherford is over here, we can take that, and if you want to put on something on Thursday, you can do it, okay?

(Mr. Morgan) All right, sir.

At the conclusion of this case?

(The Court) Yes.

(Mr. Morgan) Fine.

(The Court) All right.

(Mr. Morgan) Maybe Mr. Rutherford could just be on call, unless he wants to watch the rest of this case, we have no objection to that.

(The Court) Well, we've got some other people to go on here.

Mr. Rutherford, what do you want to, stay over here or do you want to go back?

I hate to bring you back and forth, that's all I'm thinking about.

(Mr. Rutherford) Your Honor, I'll do whatever counsel and Your Honor thinks best.

(The Court) How much longer are you going to be in this thing, do you think?

(Mr. Rosenthal) Well, if Your Honor please, we would (255) have as of this moment no redirect of Lt. Smith and I think we are rapidly approaching the end of cross-examination by Mr. Morgan, but we do have in the courtroom Major Mills and Warden McCallan for the purposes of substantiating the matters in the letter of October 17, 1972.

Now, assuming that the examination on direct, Your Honor, would go merely to this letter, the contents and the information thereof, and I assume that cross-examination would be limited to those points, which would not be that long.

(The Court) All right.

Well, then that means about an hour, Mr. Rutherford, do you want to stay around?

(Mr. Rutherford) I'll wait, Your Honor.

(The Court) You may get something over there that should be filed, and then file it and you can be back over here.

That's all right.

(Mr. Rutherford) Thank you, Your Honor.

(Discussion off the record.)

(Mr. Morgan) Your Honor, prior to the break, there were some articles of evidence that we had to have Xeroxed and during the break I submitted those to the Clerk and they have since been filed.

(256) (The Court) All right.

(Mr. Morgan) In addition to that, the Plaintiffs and the Defendants have stipulated to Plaintiff's Exhibit 5, I believe, which is a notice of offense and adjustment team report.

(The Court) What is it?

(The Clerk) Notice of offense.

(Mr. Morgan) Notice of offense, Your Honor, dated November 20th, 1971, and an adjustment team report dated the same day.

(The Clerk) Marked Plaintiff's Exhibit No. 5.

(Document was marked Plaintiff's Exhibit No. 5.)

(Mr. Rosenthal) For the record, Your Honor, instead of a stipulation, I think it would be better to state that we have no objections.

(Mr. Morgan) Fine.

In addition to that, Your Honor, during the initial stage of cross-examination of Lt. Smith, I showed him and he identified and read from Pages 194 through 197 of the south wing log book, and although I don't think I formally introduced those pages into evidence at that time, I would like to do so now, we have Xerox copies of them.

(The Clerk) The south wing log book.

(Mr. Morgan) This is the south wing log book, Pages (257) 194 and—

(The Court) Well, we did introduce that, didn't we, Mr. Graham?

(The Clerk) We have Page 41, Your Honor.

(The Court) Oh, this is different?

(Mr. Morgan) We have Page 41 of the south wing desk book, I think.

(The Court) Oh.

(Mr. Morgan) This is the log book, and we also have Pages 9 and 10 of the isolated confinement log book.

(The Court) Well, I thought those were in.

(The Clerk) This will be marked Plaintiff's Exhibit Number 6.

(The Court) What is it?

(The Clerk) 6, sir.

(Document was marked Plaintiff's Exhibit No. 6.)

By Mr. Morgan:

Q. Lt. Smith, can you identify this document? A. This document here?

Q. This entire package.

(Mr. Morgan) For the record, this is a package of about one and a half inches in width, it's a file with a sheaf of papers in it.

(The Witness) It looks like a folder to me.

(258) By Mr. Morgan:

Q. The base file from the institution on Mr. McCray? A. Right. That's his there, it looks like.

Q. All right, sir.

I direct your attention to a sheet of paper placed in approximately the middle of the base file with Milton McCray's name on it and the institutional number 110563 with a notation, received 12/30/71, and I'm asking if you can identify the writing there? A. It looks like the clerk's writing.

Q. The south wing clerk? A. Right, his writing looks like that.

Q. Can you read the writing? A. It says, placed in IC Number 3, at own request.

(The Court) Placed in IC, what?

(The Witness) Number 3, at own request.

That's the third cell in the IC area.

(The Court) What's the date of it?

(The Witness) 12/30/71, and—

(Mr. Rosenthal) Your Honor please, unless there is some relevancy, December 30th, it's six weeks later.

(The Witness) According to this thing — I'll read the whole thing all over again.

(Mr. Morgan) Well, we feel this is proper cross-examination, Your Honor.

(259) (The Witness) Wait a minute. Placed in IC3 at own request. Defecated and spread throughout cell, ordered to MO.

(The Court) And did what?

(The Witness) Defecated again.

(The Court) Yes.

(The Witness) Which I was talking about earlier.

By Mr. Morgan:

Q. Well, Lt. Smith, it does not say, defecated again. A. I'm saying this.

Q. All right.

Do you recall two incidents of Mr. McCray defecating in his cell between November 20, 1971, and December 30, 1971? A. The only incident I recall is one, I don't recall this one here, but it's possible, it could have happened.

Q. Isn't it possible that this is the incident to which you were referring? A. No, because, actually, he did it numerous times, but the times before that he had done it, I don't know anything about. I did read somewhere in his base file.

Q. In any event, this is an incident of his defecating in the isolation area cell on 12/30/71? A. Well, as I said before, things that should be documented, everything is not documented like it should be, and (260) it may be an error on my part.

Q. But this particular instance was documented? A. That particular one was documented by the clerk.

Q. Now, on the incident that you described this morning, I believe that would have been November 21st, 1971? A. Ahuh.

Q. When you went to his cell in the morning, I believe you testified, and you witnessed his defecation on the walls of the cell and the name, Black Hawk, spelled out? A. Yes.

Q. In defecation in the cell, was there anyone else there with you at that time? A. Officer Hendricks was there, and I don't know any other officers that were there, but I did get the tier runner to come there for clean-up, his waste material.

Q. Is Officer Hendricks still there, a Correctional Officer at the Penitentiary? A. Right.

Q. Did you have an opportunity to discuss this matter with Officer Hendricks before you testified today? A. No.

Q. You also testified that after this incident you requested that the psychologist, Dr. Musk, a Mr. Musk, see Mr. McCray, is that correct? A. That's what I said.

(261) Q. Now, when did that occur? A. The same day that he defecated on the wall.

Q. And when did Mr. Musk come to the isolated confinement area and see Mr. McCray?

(The Court) How do you spell this?

(The Witness) M-u-s-k.

He came prior to the noon feeding, you know, the noon meal, which starts at 11:30.

By Mr. Morgan:

Q. Did you talk to Mr. Musk at that time? A. I told him who I wanted him to see, so he talked to Milton McCray.

Q. And the very next day, Mr. McCray was released from isolated confinement? A. I believe he was.

Q. Was he released by you personally? A. Well, he was put back up on the tier.

Q. Sgt. Smith, going back to the beginning of this incident on the tier, you said Mr. McCray was making a disturbance and causing some noise, did Mr. McCray say anything to you when you went to his cell? A. Well, the first cell he was in, or are you talking about the second cell?

Q. The second occasion. (262) A. The second occasion, when I put him down in the IC area.

Q. Just before you put him in the IC area, did you have occasion to talk to Mr. McCray? A. He was making derogatory statements to me, but that happens all the time, but with any derogatory statement he was talking about doing harm to himself, this is the reason why I disrobed him when I took him down, for precautions, of hurting himself.

Q. What specific harm was he suggesting he would do to himslef? A. Well, he didn't make any specific harm, but he said he wasn't going to do any time in the south wing, he would rather die than do time in the south wing, and so, that was enough for me to see that he might do something to injure himself, that's why I took precautions.

Q. Isn't it true that he asked you about his law books and requested— A. Yes, he asked that all the time, the minute he comes in the door he asks that.

Q. Was there any reason why you couldn't have given him his law books on that day? A. Yes.

Q. Why was that? A. When he first came over to the south wing area, (263) nobody had had time to pick his law books up from his previous cell and inventory what he had, so when a man first comes in the south wing area, he comes in himself. The law books, and what have you, follow.

Q. Didn't you testify that he had been on south wing since the 17th of November? A. Yes, he came on the 17th of November.

Q. Well, that would have been three days, does it normally take more than three days? A. It may take a week.

Q. For his personal belongings? A. That's right, it depends on how many people come over that particular time.

Q. I see.

Didn't Mr. McCray ask if he could have a shower at that time? A. He had a shower.

Q. He had been given a shower, a delousing shower, isn't that correct? A. There wasn't any such thing as a delousing shower.

When he came over the first day, we didn't know about his prescriptions. The following day, the hospital sent over his prescriptions for a medical shower. He was getting medical showers frequently, at least once a day, or (264) something. If a day, he missed a medical shower because of something happening in the institution, we'd call him down and give him a medical shower, and he was also given his little plastic container to apply to his body when he got through showering.

Q. You're talking general terms, now, you're not talking about— A. About him, talking about him.

Q. You're not talking about that specific day? A. The second day he got a shower, he had defecated on himself.

Q. No, I'm talking about the day on which he was put into IC. A. The day he was put into IC, he didn't get a shower, not to my knowledge, he didn't.

(The Court) He didn't what?

(The Witness) He didn't get a shower, the day he was put into IC. The day he was put into IC, the same day he came into the south wing.

(The Court) Didn't he come in the south wing on the 17th?

(The Witness) I believe it was the 17th, I'm not positive, the date.

By Mr. Morgan:

Q. Well, Lt. Smith, the 17th was three days before the (265) 20th, and the 20th is the day he was put into IC, therefore, he couldn't have been put into IC the same day he came to the south wing, could he? A. What — sure, he could be put into IC the same day he come to south wing, but what day—

Q. That's not what happened to Mr. McCray. A. What day was that on, was that a Saturday?

Q. I don't know.

(The Court) Here it is, what day was it on, it says up top, doesn't it?

Let me see those exhibits.

(Handed.)

(Mr. Rosenthal) Your Honor please, I have a '71 calendar here.

(The Court) It is a Saturday, I know that.

(Mr. Rosenthal) Yes, sir, it was a Saturday.

(The Witness) Well, that explains itself.

Saturdays is one of the shower days for the whole wing, so every time a man gets a shower, especially IC, we document it. We document it for the purpose, if he refuses one and turns around Monday and makes a complaint that he didn't get one—

By Mr. Morgan:

Q. All right, do you normally work on Sundays, Sgt. Smith, — Lt. Smith? (266) A. Right.

Q. You do work Sundays? A. Right.

Q. During this period of time, were you working on Sundays? A. I don't recall.

Q. You just testified that you recall going in the IC area the very next day, which was a Sunday. A. The next day is Sunday.

This is why I asked you, was the next day a Sunday.

Q. Well, the 20th, Mr. Rosenthal tells us, was a— A. Now, wait a minute, you said he came in the wing on the 17th?

Q. It's your testimony, Sgt. Smith. A. I mean, you said this, I said the next day I called the psychologist. Now, whether it was Saturday, or Wednesday, or Thursday, I'm not sure.

Q. That would have been the day following the day he was put into IC? A. Correct.

Q. My question is, assuming that had been a Sunday, would you have been on duty that day? A. That particular Sunday, I don't know.

Q. Sgt. Smith, you testified that you went into the IC area the following day— (267) A. Listen—

Q. —and saw what you saw. Now, you're testifying that you don't recall whether you were on duty that day. A. Well, you listen.

If the day he came in the wing was a Saturday, I was working Sunday. If it had been a Thursday, I'm not positive I was working Sunday, or not.

Do you understand that?

Q. Is the isolated confinement area supervised by a correctional guard, officer? A. I explained to you earlier.

Q. How is it supervised? A. An officer that works back there in the storeroom, by the name of Hendricks, he's back there five days a week.

Q. Does he sit in that area all the time? A. He's in there, unless he's needed elsewhere.

Q. From where the guard post is in that particular area, can he see into all the cells? A. He's about 15 feet away from them.

Q. From each of the cells? A. The cells are all in front of him, he's facing them.

Q. He could see in Cell Number 5, couldn't he? A. He could see in Cell Number 5, 4, 3,—

Q. If an inmate was in Cell Number 5 doing bodily harm (268) to himself, Sgt. Hendricks could see that, couldn't he? A. Right, and then he has to check them every half hour, anyway.

Q. Are there any written regulations or policy, Sgt. Smith, that guide you when you put an inmate — or during this period of time, at least, that would have guided you when you put an inmate into isolated confinement concerning whether he was to receive a mattress, or not? A. I explained that to you once, but I'll do it again.

If an inmate is going to do some harm to himself, I remove the mattress.

If he's not attempting to do any bodily harm to himself, he gets a mattress when he goes in. Also, a pair of coveralls.

Q. Well, my question, Sgt. Smith, was whether or not there was any written policy or regulations at this period of time concerning— A. No, it's not a written regulation, you have to use your own judgment in a lot of incidents.

Q. From your own experience? A. Right.

Q. Was Mr. McCray, when he was put in isolated confinement, given any reading materials? A. When he was first put in, I didn't give him anything.

(269) Q. Is there any reason why he couldn't have had reading materials, in your judgment? A. Well, like I said, when I put him in the first time, I stripped him of everything because he was talking about doing bodily harm to himself, so that means he didn't get reading materials, books, pencils, or anything.

Q. From your experience in the institution, Sgt. Smith, have you ever had personal knowledge of an inmate doing bodily harm to himself with a book? A. No, but in my personal experience I've cut an inmate down that had hung himself by strips off a mattress, or sheets.

Q. But you never had that kind of occasion with regard to a book, have you? A. No.

Q. Was Mr. McCray given a blanket? A. Nothing, nothing.

Q. Did you testify, Lt. Smith, that Mr. McCray's clothing was removed before he was put into isolated confinement? A. You're playing games with me, I just explained—

Q. Well, I believe you testified on direct examination that his clothing was not removed. A. I told you, when I brought him down he was talking about doing bodily harm to himself. I stripped him, stripped, (270) that means no clothes.

Q. In the same deposition that I referred to before, Lt. Smith, on June 7, 1973, on pages 7 and 8, my question was, at the bottom of the page:

Did McCray have clothes on when you put him in?

Referring to IC.

Your Answer:

Right.

(Mr. Rosenthal) Objection, Your Honor, because it doesn't say, referring to IC, in the deposition.

(Mr. Morgan) Well, if we want to read back through the whole deposition, I think we can agree that that's what we were discussing.

Do you want to start back further?

(Mr. Rosenthal) Read the whole thing.

(Mr. Morgan) Well, we would have to begin back at the middle of Page 6.

(Mr. Rosenthal) Well, I think that's all right, if you continue 7 and 8, I think the Lieutenant explains himself.

(Mr. Morgan) All right, fine.

Beginning on Page 7. Okay.

Did McCray have clothes on when you put him in?

Answer, right.

Question, he did?

Answer, ahuh.

(271) Question, wasn't stripped?

Answer, no, at that time he wasn't stripped, he had a set of coveralls on.

Question, was he stripped later?

Now, I don't remember, I'm not for sure whether he was stripped later, or not.

By Mr. Morgan:

Q. Now, your testimony here today is that before you put him in the cell, he was stripped, because you felt he was to do bodily harm to himself? A. Right, and,

listen, when he first came in, when an inmate first comes in a segregated area, he automatically goes in IC, that's any inmate.

Q. No— A. Now, listen.

And then he's searched, he's stripped of all his institutional clothing and puts on a set of green coveralls and he goes on the tier.

Q. Yes. A. If I bring him back down to IC to be housed for some infraction that — or something he was going to do to himself, if I thought he was going to do some harm to himself, then I would strip him completely and leave him stripped.

Q. Yes. A. And I think that should answer that, too.

(272) Q. And that's what you did in Mr. McCray's case? A. Right.

Q. And what you said in your deposition was incorrect then? A. It seems to me like, when he first came in IC, he had clothes on, you understand, he came in, he had clothes on.

Q. After you brought him down from the tier, he had his coveralls on, right? A. Correct. On the tier he had his coveralls on.

Q. Right. A. Correct. And then when I put him back in IC for housing, he had nothing on.

Q. In your deposition, Sgt. Smith, at Page 8, you stated in answer to my question:

Wasn't stripped?

No, at that time, he wasn't stripped. He had a set of coveralls on.

Was he stripped later?

Now, I don't remember, I'm not for sure whether he was stripped later, or not. A. Well, I did strip him later, but when he first came there he wasn't stripped.

Q. In other words, your statement in your deposition, I'm not sure whether he was stripped later, or not— (273) A. And after think about what really

happened the following day, I remember him being stripped, and then the next day I came in he had a mattress, which Officer Green gave him on 4:00 to 12:00.

Q. Well, in any event, it's your best recollection at this point that when you put him in the IC cell, you stripped him before putting him in? A. The second time down, right.

(Mr. Morgan) Excuse me, Your Honor, could I have just a couple of seconds?

(The Court) Ahuh.

By Mr. Morgan:

Q. —Lt. Smith, I apologize, getting back to the keeping of records on the south wing.

If in this situation, and we will assume that you did since you testified to it, when you contacted Dr. Musk to come into the south wing area to talk to Mr. McCray, if you had made a record of that, where would that have been recorded? A. If I made a record, it would be in the log book, I'm not positive I made a record of that, or not.

Q. It would be in the IC log book, the south wing log book, or the— A. It would be in the south wing log book.

Q. As opposed to the south wing desk book? (274) A. Right.

But, usually, when he's done, he leaves a little notation to what to expect of the inmate, or watch him closely, or something like that, it would be somewhere in his log, I imagine.

Q. Would Dr. Musk also make a notation in any of the south wing or IC log books that he had been in the area to see a certain inmate? A. No. We take that ourselves.

Q. But, to your knowledge, Dr. Musk keeps his own log book? A. I imagine he does.

Q. Have you ever seen him writing? A. Well, he always carried a little pad, he didn't carry a log book around with him.

Q. I see.

(Mr. Morgan) The Plaintiff has no further questions of Defendant Smith.

Thank you, Lieutenant.

(Mr. Rosenthal) Your Honor, I just have one question.

REDIRECT EXAMINATION

By Mr. Rosenthal:

Q. I refer you, Lt. Smith, to your deposition, on Page 16.

(275) Earlier this morning, Mr. Morgan referred to the time that you would keep someone on isolation, and ask if you can remember saying this on Page 16, if someone was in the IC unit involuntarily, and then I'm quoting you, then I wouldn't give him more than three days, period. Most of the time I keep him overnight, period.

Is that correct? A. Right.

Q. And that was, basically, your testimony earlier today? A. Right.

(Mr. Rosenthal) I have no further questions, Your Honor.

(The Court) Is there any record around here that shows when McCray came into the south wing?

(Mr. Rosenthal) Yes, Your Honor, the base file.

(The Court) Sir?

(Mr. Rosenthal) The base file, Your Honor.

(The Court) All right, when does it show he came in there?

(Mr. Rosenthal) On November 17, he was — well, it says, work assignment was changed from school to segregation, and his cell from A-301 to D-232.

By Mr. Rosenthal:

Q. Would D-232 be in the south wing? (276) A. Ahuh.

(Mr. Rosenthal) And then on the 20th is the report of the stripping, or tearing of the mattress, which was made by, I think, Officer Greenwood.

(The Court) It shows he went on the south wing on November the 17th?

(Mr. Rosenthal) Apparently, Your Honor, yes.

(The Court) Are there any other records in there pertinent to this situation that we're discussing now?

(Mr. Morgan) Regarding this date?

(The Court) Either the date, or the incident, other than what has been related? You people went through that.

(Mr. Rosenthal) We haven't seen anything relating to the incident itself, Your Honor.

(Mr. Morgan) Your Honor, in discovery, we requested all the files that are concerned here and we thoroughly reviewed them all and we could find no records of Mr. McCray being put into IC, nor can we find any records of why he was—

(The Court) No record of his being what?

(Mr. Morgan) We have no — we find no record, other than what we've introduced in evidence, and I think we have three pieces of documents, that indicate that he was in the isolated confinement area.

(277) We have disciplinary report records introduced into evidence which indicate that he tore his mattress during that period of time.

We have no disciplinary report on the — nor is there a disciplinary report on the initial disturbance that Mr. McCray was allegedly causing on south wing prior to his being put in isolated confinement.

Similarly, there are no records that we've been able to discover in the files that were given to us concerning the matter of his being visited by Dr. Musk, or his having destroyed his cell with his own defecation.

(The Court) All right.

(The Clerk) That's all.

(Mr. Rosenthal) Step down.

* * * * * *

(329) PROCEEDINGS OF JUNE 13, 1973

(The Court) Good morning.

(Mr. Morgan) Your Honor, I think the first matter we should deal with is the rebuttal testimony, which should be very brief, in the case of McCray versus Lt. Smith, and in rebuttal we have today Mr. Musk, the psychologist from the Penitentiary, Officer Hendricks from the Penitentiary, and also, very briefly, we would hear from the Plaintiff himself, Mr. McCray.

(The Court) All right.

What is that number again?

72, what?

(The Clerk) 234.

(Mr. Morgan) 234, Your Honor.

(The Court) 72-234?

(The Clerk) Yes, sir.

(The Court) All right.

(Mr. Morgan) We would call Mr. Musk as our first witness in rebuttal.

HENRY MUSK,

was called as a witness for and on behalf of the Plaintiff, and, having been first duly sworn, testified as follows:

(The Clerk) State your name.

(The Witness) Henry Musk. M-u-s-k.

DIRECT EXAMINATION

By Mr. Morgan:

Q. Mr. Musk, you have been called to testify this morning as a rebuttal witness on behalf of the Plaintiff, Milton McCray, in this case.

(Mr. Morgan) Your Honor, I might add that Mr. Rosenthal and I have agreed that I can present the facts of what is going on in the case before Mr. Musk so that he will be aware of it and it will probably save some time that way.

(The Court) Very well.

By Mr. Morgan:

Q. Mr. Musk, yesterday in this case, there was testimony to the effect that on November 20th, 1971, Milton McCray, the Plaintiff, was housed in the segregation section of the south wing at the Penitentiary.

On that same day, November 20, 1971, the Plaintiff was moved from the segregation section into the isolated confinement section, Cell Number 5.

(331) There was also testimony that on November 21st of 1971, Mr. McCray was viewed in a cell in the isolated confinement area, having defecated into a cup and spread feces on the wall of his cell.

There was further testimony that you, Mr. Musk, were called by south wing officers in response to having seen that and asked to interview Mr. McCray.

Our questions to you this morning, and, first of all, are you familiar with the Plaintiff, Mr. McCray? A. Yes.

Q. Have you had an opportunity to talk to him in the past? A. Yes.

Q. Do you recall on what occasions you've talked to Mr. McCray? A. I talked to him on many occasions, sometimes in the south wing, sometimes in the south wing annex, which was an in-patient treatment area in the Penitentiary, and sometimes privately and sometimes with the consulting psychiatrist.

Q. What was your position at the Penitentiary, Mr. Musk? A. I'm no longer at the Penitentiary, I'm Psychologist One Correctional at the Women's Institution.

From March '71 to March '73, I was a Psychologist One.

(332) (The Court) You were what?

Speak up, please.

(The Witness) A Psychologist One Correctional at the Maryland Penitentiary.

(The Court) March '71 to when?

(The Witness) March '73.

(The Court) You were a psychologist, what?

(The Witness) One Correctional, that's the classification.

By Mr. Morgan:

Q. Mr. Musk, if you recall, at any time, either on November 21st of 1971, or shortly thereafter, did you have occasion to talk to Milton McCray? A. In the written notes that I have—

Q. Perhaps you can describe what you have on your lap there to the Court. A. This is a file which contains psychiatric reports, psychological testing, a list of the various medications that Mr. McCray has been on, a list of various appointments with other doctors.

Q. Is that the file in which you would keep reports of interviews with Mr. McCray? A. Yes.

The first note I see that I have written down is dated 10/24/71, and the note after that is May 24th, 1972.

(333) Q. Do either of the notes in that case indicate that the subject of your conversation with Mr. McCray had to deal with defecation? A. No.

Q. Do you recall talking to Mr. McCray at any time in the isolated confinement area? A. Yes.

Q. Do you recall whether those conversations — do you recall the dates of those conversations? A. No.

Q. Do you recall specifically in November, or the early part of December, of 1971, talking to Mr. McCray in the isolated confinement area concerning defecation in his cell? A. No.

Q. Had such a conversation occurred, would you have made notes of that conversation? A. Most probably.

Q. If you had made notes, would those notes have been in his file? A. They should be.

Q. Do you have any personal recollection, other than what's in the file, of having discussed with Mr. McCray at any time the matter of his defecation in a cell? A. In his cell at Patuxent, but not in his cell at the Penitentiary.

(334) Q. Do you recall in any of your conversations with Mr. McCray, talking with Mr. McCray about defecating in a cell at the Penitentiary? A. No.

Q. Do you recall visiting Mr. McCray in late November or late December in the isolated confinement area? A. No.

Q. Is there anything in the records before you that indicate that such a visit was made? A. No.

The only — the note of 10/24/71, I was asked to see Mr. McCray on 10/22/71, I called for him twice on 10/23/71, and went to the west wing, but he couldn't be found, and I said that he will be seen if he requests an appointment in the future.

Q. That was in October of '71? A. Ahuh.

Q. Do you recall on or about November 21st, 1971, your having been contacted by Sgt. Smith of the south wing? A. In that month, I'm sure that I was.

Q. Do you know Sgt. Smith? A. Yes.

Q. Do you recall being contacted by Sgt. Smith on or about November 21st, 1971, concerning Milton McCray? A. No.

(335) That doesn't mean it didn't happen. I just don't remember.

Q. Is there anything in your records that indicates that occurred? A. No.

(Mr. Morgan) We have no further questions.

Thank you, Mr. Musk.

CROSS EXAMINATION

By Mr. Rosenthal:

Q. Mr. Musk, when counsel, Mr. Morgan, asked, do you recall, your answer was no, you are referring to the fact that you do not recall, rather than the fact that you were not asked to do something? A. Right.

Q. So, as a matter of fact, it is possible that these things took place, but because of the time element, you just do not recall? A. That's correct.

Q. All right.

Now, every time you would be called to speak to Mr. McCray, or to any inmate, would that request definitely go into the file that is kept, such as you have in your hand? A. No.

(336) Q. Do you recall approximately how many times you may have seen Mr. McCray on the south wing, that's if you recall? A. At least 10.

Q. At least 10 times? A. Ahuh.

Q. And the file in front of you would reflect how many times, if it does so reflect? A. I don't think there is one note that indicates that I saw him in the south wing.

There isn't.

(The Court) What did you say now?

(The Witness) Pardon?

(The Court) I didn't understand your answer.

(The Witness) I saw Mr. McCray at least 10 times over the period of time that I was employed at the Penitentiary in the south wing, but there is no note of those meetings in this file.

(Mr. Rosenthal) I have no further questions, Your Honor.

REDIRECT EXAMINATION

By Mr. Morgan:

Q. Just one other question, Mr. Musk.

In response to Mr. Rosenthal's question that you have seen men on south wing, and that, in particular,

you've (337) seen Mr. McCray 10 times on south wing, what exactly do you mean by having seen men on — or Mr. McCray on south wing? A. There were two occasions that I remember specifically, and concerning each of these occasions I saw him a couple of times.

One was he was in the isolation area because of an incident involved with a ring.

(The Court) Involved with what?

(The Witness) A ring, a missing ring.

And I saw him a couple of times on that, for that reason; and the second time that I remember was after his cell had caught on fire, I saw him back in the isolation area a couple of times.

By Mr. Morgan:

Q. Do you recall any other specific instances when you saw Mr. McCray on south wing? A. Those are the only two I can clearly remember right now.

Q. So, of the 10 or so times that you saw him, approximately four you can account for, perhaps six you can't account for.

On those occasions, was your conversation with Mr. McCray in the nature of a psychological examination? A. No.

(338) Q. Could you describe what the nature of your conversation was? A. As regards the ring, Mr. McCray told me that he felt he was — he said that he had been taken to the Captain's office, a ring of his was missing, he had been taken to the Captain's office, and I think he said the Captain asked him if he was accusing one of his officers of taking the ring, and I think Mr. McCray said that he did, and then Mr. McCray said the Captain put him in the isolation area.

And I said, well, this is a disciplinary matter, I can talk to the Captain about it.

I went to the Captain, the Captain told me this is what had happened.

Q. Mr. Musk, I believe you testified that you had knowledge of Mr. McCray's record at Patuxent Institution of having defecated in his cell? A. Yes.

Q. Was it also your testimony that you have no knowledge, personal or otherwise, of his having defecated in his cell at the Penitentiary? A. I can't remember if he had, that doesn't mean it didn't happen, but I don't remember.

(Mr. Morgan) Fine, thank you, sir.

(339) (The Court) In view of his talking to McCray after the cell fire, don't you think he better stay around, to see what he knows about that?

(Mr. Morgan) Your Honor, we didn't specifically intend to call Mr. Musk in connection with that. I do recall a report in the materials we discovered, and I can't recall whether it would be particularly helpful, one way or another.

(The Court) Well, if you can, maybe you better stay here; and take his testimony in that connection, after we get through, okay?

(Mr. Morgan) Fine.

Perhaps we could take a brief recess after this and Mr. Rosenthal and I could talk to him and if he has relevant testimony we could take it today.

(The Court) All right.

(Mr. Morgan) Officer Hendricks, would you take the stand, please?

JAMES A. HENDRICKS,

was called as a witness for and on behalf of the Plaintiff, and, having been first duly sworn, testified as follows:

(The Clerk) State your name, please.

(The Witness) James A. Hendricks.

H-e-n-d-r-i-c-k-s.

(The Clerk) Thank you.

(340) DIRECT EXAMINATION

By Mr. Morgan:

Q. Officer Hendricks, where are you presently employed? A. Maryland State Penitentiary.

Q. Were you employed at the Penitentiary in the month of November, 1971? A. Yes.

Q. Do you recall what your duty assignment was at that time? A. No, I don't.

Q. Do you recall what your duty assignment was on November 21st, 1971, specifically? A. No.

Q. Have you ever been — has your duty assignment ever been south wing? A. Yes.

Q. Could it have been south wing during that period of time? A. It's possible.

Q. Do you know Lt. Smith? A. Yes.

Q. Then Sgt. Smith? A. Right.

Q. By way of introduction, Officer Hendricks, as I explained to Mr. Musk, the testimony in this case concerns (341) Mr. McCray having been removed from his cell in south wing and placed in an isolated confinement cell on November 20, 1971.

There is also testimony in this case that on November 21st, 1971, Mr. McCray was viewed in his cell by Correctional Officers, his cell — he having defecated in his cell and he having spread feces on the wall of his cell.

My question to you is, do you recall on November 21st, 1971, your having been in the isolated confinement cell area and having viewed Mr. McCray in an isolated confinement cell, Mr. McCray having defecated and having spread feces on the wall of his cell? A. No, I can't recall.

Q. Do you recall at any time in your career at the Penitentiary of having been in the isolated confinement area at a time when Mr. McCray was in one of the isolated confinement cells, when you viewed feces spread on the walls of his cell? A. No.

Q. Do you know Mr. McCray? A. Yes, sir.

Q. Did you know Mr. McCray in November of 1971? A. Yes, sir.

(Mr. Morgan) Thank you, Officer Hendricks, I have (342) no other questions.

(The Witness) Okay.

(Mr. Rosenthal) I have no questions, Your Honor.

(The Court) All right.

(Mr. Morgan) Your Honor, I would ask the Plaintiff, Mr. McCray, to take the stand for a brief series of questions in rebuttal.

(The Court) Very well.

(Mr. Rosenthal) Your Honor, may Officer Hendricks be excused?

(The Court) Yes.

MILTON McCRAY,

the Plaintiff, resumed the witness stand, and, having been previously duly sworn, testified further, as follows:

(The Clerk) Just be seated, Mr. McCray, you are still under oath.

Milton McCray.

DIRECT EXAMINATION

By Mr. Morgan:

Q. Mr. McCray, you testified on direct examination, I believe, that on November 20th, 1971, you were removed from your cell in south wing and placed in the isolated confinement area, is that correct? (343) A. Yes.

Q. Now, in connection with that move from south wing to isolated confinement — well, first, let me ask you this question.

Were you familiar at that time with the disciplinary procedures at the Maryland Penitentiary? A. Yes.

Q. Adjustment team procedures? A. Yes.

Q. Were you familiar with adjustment notices of offenses? A. Yes.

Q. Did you at any time receive a notice of offense for creating a disturbance in south wing on November 20th of 1971? A. Absolutely not, no.

Q. All right.

Now, did you at any time receive a disciplinary or adjustment hearing— A. No.

Q. —for a charge of creating a disturbance on November 20th, 1971, in south wing? A. None at all.

Q. Did you receive such a hearing — well, I withdraw that question. (344) A. If you're speaking of the incident concerning the defection in the cell, I have known inmates to have been involved in such activity in the Penitentiary, and they definitely received disciplinary—

(Mr. Rosenthal) I object, Your Honor, and ask it be stricken.

I don't think that, number one, it's responsive to the question of counsel, and number two, involving other inmates, I don't think also would be relevant to the question of Mr. McCray in this particular case.

(Mr. Morgan) Your Honor, my question to Mr. McCray was directed only to the incident of his creating a disturbance on south wing.

(The Court) Yes, it was.

Objection sustained.

(Mr. Morgan) My question didn't go to the incident in isolated confinement.

(The Court) All right.

By Mr. Morgan:

Q. Mr. McCray, on November 20th, 1971, when you were in your cell in segregation, you heard the testimony of Officer Smith that he came to your cell, do you recall at that time indicating to Officer Smith that you intended to do bodily harm to yourself? A. No. The only statements made to Sgt. Smith was in (345)

reference to my medication, my medicated showers, and receiving my law books as the Warden had prescribed and ordered at that particular time.

Q. Did you at that time threaten to do bodily harm to yourself? A. No, I had no reason, no.

Q. Prior to your having been taken to isolated confinement, Mr. McCray, did you tear the locker of your cell off the wall? A. No, that's impossible for me to tear one of those lockers off the wall.

Q. Did you tear up the mattress in your cell on south wing? A. No, I didn't.

If I did, I'm quite sure I would have got a disciplinary order for it.

Q. Mr. McCray, you testified yesterday, I believe, that when you were first put on south wing you were put on the street side and you were only there briefly because that cell had lice in it, is that correct? A. Yes.

Q. And you also testified, I believe, that you were removed from that cell and taken to the yard side? A. No, I was taken to the hole area.

Q. Well, after — well, I believe you testified that (346) you were removed from the cell because it had lice, is that correct? A. Right, and taken to the hole area.

Q. And held in the hole area? A. I was held there until I saw the Warden coming through and I explained that I was taken out of the cell with lice in it.

Q. Yes. A. And I had requested showers and some type of delicing, and powder, whatever. The result of it, I received no response from any of the officers that I requested this request, and he inquired into it and the officers did verify that I was in a cell that was supposed to have had someone in there that had lice and I was — the Warden, in turn, ordered that — I explained about the law books also, and he, in turn, ordered that I be taken out of the cell, given a shower, placed on south wing, and given my law books.

That's when, I think two days later or a day later, I insisted that I have my law books and the showers from

then on, and that resulted in me being taken out of the cell, into the hole, and Sgt. Smith subsequently threw water on me as a result of his dislike for me, and I don't know what his reasons was—

Q. Mr. McCray, just so we can get the sequence of events clear for the record, is it your testimony that when you (347) came on south wing initially, you were placed in a cell on the street side, the cell on the street side had lice in it, as a result you were removed from that cell and held briefly in the isolated confinement area— A. Yes.

Q. —you were then moved up to—

(Mr. Rosenthal) Your Honor please, I think the witness should testify rather than counsel summarizing.

(The Court) Well, all he's doing is summarizing what McCray said.

(Mr. Rosenthal) All right.

By Mr. Morgan:

Q. I believe you then testified that after being held briefly in isolated confinement area, you were removed to a cell on the yard side, and then on November 20th were moved to isolated confinement area again? A. Yes.

Q. For the period of time that is the subject of this case? A. That is correct.

Q. Is all that correct? A. Correct.

Q. Each of those four or five incidents is correct? A. Yes, it is.

Q. All right.

(348) Now, Mr. McCray, I believe you testified on direct and Officer Smith testified also that on November 20th you were yelling out of your cell— A. Yes.

Q. —is that correct? A. Yes, I was.

(The Court) Wait a minute.

You were yelling out of the cell, that's when you were moved to the yard side?

(The Witness) Yes, when I was taken out of the hole as a result of the orders of the Warden, after the shower.

(The Court) All right, and then what were you yelling about?

(The Witness) I was yelling to receive the law books that I had heard personally that the Warden — from the Warden, the Assistant Warden, that I should be given, and Sgt. Smith refused to give them to me.

(The Court) And you were yelling?

(The Witness) I was yelling to get them up there so that I could get the books. As a matter of fact, I would sit down and talk to officers passing by, giving them details of why I should have these law books and why I was so anxious to get them, and it seemed that all these requests didn't avail anything, so I just continued calling, hoping that someone would come along that would be able to give them to me in (349) compliance with the Warden's orders.

(The Court) Were you calling loudly?

(The Witness) Yes. I was calling loud enough for the officers to hear.

There was no officer patroling the tier, so I had to call out to attract the officers' attention.

By Mr. Morgan:

Q. Do you recall which tier you were on at that time, Mr. McCray? A. Four, four.

Q. Where were the officers whose attention you were trying to attract? A. They were at the desk on flats, on the opposite side.

Q. How far down from your cell is the flats? A. It's about four stories.

Q. Four stories, and how far across, horizontally, from directly beneath your cell on the flats to the officers' desk is it, approximately? A. About the length of this courtroom, I assume, or a little more.

Q. Mr. McCray, besides yelling out of your cell, were you making noise of any other kind? A. Oh, no, just calling Sgt. Smith, I was calling him direct.

Q. Now, Mr. McCray, directing your attention to the (350) following day, November 21st, 1971, your testimony was, I believe, that you were at that point in isolated confinement in Cell Number 5, is that right? A. Yes.

Q. Now, did you see Sgt. Smith on that day? A. On which day was that?

Q. The 21st. A. I don't recall seeing Sgt. Smith on that day.

Q. Did you see Officer Hendricks on that day? A. No, I didn't.

Q. Did you see Mr. Musk on that day? A. No.

Q. Do you know Mr. Musk? A. Yes, very well.

Q. Do you know Officer Hendricks? A. Yes.

Q. Mr. McCray, at any time during the period from November 20th to November 22nd, when I believe you and also Sgt. Smith have testified you were in isolated confinement, did you defecate into a cup? A. No, I did not.

Q. At any time during that two-day period, did you spread feces on the wall of your cell? A. No, I did not.

Q. At any time during that two-day period were you (351) removed from your cell and put into another cell? A. No, I wasn't.

Q. At any time during the two-day period were you given a shower? A. During the two-day period?

Q. Yes. A. No.

Q. Mr. McCray, Sgt. Smith testified yesterday that at times you have been in isolated confinement voluntarily, is that correct? A. Yes.

Q. Could you explain to the Court under what circumstances you requested and when you requested that you be placed in isolated confinement? A. Well, I was in the south wing area and—

Q. Can you recall — excuse me, do you recall when this was in point of time? A. Not exactly.

I know that I was assigned to south wing area for some violation of the institution's rules, and the tiers are quite loud because all the inmates are hollering and screaming from one end to the other, and I like to be quiet, where I can be quiet and study, and the hole is the closest thing to that, plus being in the hole I had an opportunity to get my law books, and other things, and talk to officials that came (352) through that area, that would give me consideration that I couldn't get on the tiers.

So, I felt that of the two worst, being in the south wing or being in the hole, at that particular time, it would be much better for me since I had more in the hole at this particular time, permit me more in the hole, I considered being there would be more beneficial to me all around. Not so much that I like it there, but the south wing was the south wing.

Q. Mr. McCray, during those times you were in the hole voluntarily, did you have your clothes? A. Oh yes, I had more comforts in the hole at this time that I'm referring to, voluntarily there, than I had on south wing.

As a matter of fact, in the hole I had my prison state clothes, I mean, in the hole I had these, on the south wing I just had my jump suit, and I had more access to the tier runner to do little favors for me as far as giving me items that I couldn't get on the tier.

Q. Did you have a mattress on that occasion? A. I had a mattress.

Q. Did you have your personal belongings with you? A. Oh yes, just about everything I had in my cell on the tier, I had in the hole.

Q. Was the cell that you were in voluntarily the same or (353) —was it the same — on the occasion you were in the cell voluntarily, was it the same cell that you were in? A. Oh, no, it was a much better cell because I had all my personal property, it was much more convenient.

(Mr. Morgan) Fine.

I have no other questions of Mr. McCray.

Thank you.

CROSS EXAMINATION

By Mr. Rosenthal:

Q. Mr. McCray, if my memory serves me correctly, you testified on Monday, or yesterday, in reference to this case that at the time you were yelling loudly to attract attention that there were no other inmates on the south wing yelling? A. There weren't.

Q. There weren't, is that correct? A. There weren't.

Q. And now today, you testified the reason that you voluntarily asked to be placed in IC was because of the disturbance of the other inmates, always loud noises and talking? A. Yes.

Q. Now, when you just testified that this particular cell, when you were placed — voluntarily asked to be placed in IC, was a much better cell than Number 5, was that the understanding that— (354) A. Yes.

Q. Now, what cell were you in? A. I was in Number 1.

Q. Number. 1.

And why is this a much better cell? A. If you're talking about the physical—

Q. Yes. A. —aspect of the cell, it was no different, except for the fact that in the Cell Number 5, I had no clothes, no mattress.

Q. I'm talking about the physical features of Cell 1 as against the physical features of Cell 5. A. There's no difference in physical features.

Q. Right. A. Except I had all my property in that cell, my books, my clothing, my mattress, I had a blanket, I had a sheet, they gave me all of the things that I could have had in the south wing area, and I had personally cleaned the cell myself and made it comfortable for me to live in.

(Mr. Rosenthal) No further questions, Your Honor.

(Mr. Morgan) Unless Your Honor has some questions of Mr. McCray, we have nothing further.

(The Court) Not right now.

(Mr. Morgan) All right, you may step down, Mr. McCray.

* * * * * *

(381) (The Court) All right.

Now, what about — that leave only one case, and that is the Burrell case.

(Mr. Morgan) The Burrell case, which will begin at 10:00 o'clock tomorrow morning.

(382) (The Court) All right.

Now, however, Mr. Musk, apparently, knows something about it, should we take his testimony today?

(Mr. Morgan) Well, Your Honor, I think if we could have just a very brief recess, Mr. Rosenthal and I could talk to Mr. Musk and see.

(The Court) All right, let's do that, see what you want to do about it.

(At the conclusion of a short recess, the following proceedings were had:)

(The Court) All right.

Now, let's see, now, Counsel in this matter, you understand that the case is going on tomorrow, but inasmuch as — in order to save time, I assume you will agree, Mr. Morgan, we might as well take Dr. Musk at this time, right?

(Mr. Morgan) Yes, Your Honor.

Mr. Musk will be the Defendant's witness.

(The Clerk) That's Civil Action 72-68-N, Milton McCray — that will be amended to read, Captain Burrell, is that correct?

(Mr. Morgan) That's right.

(The Clerk) All right.

(383) HENRY MUSK,

resumed the witness stand, and, having been previously duly sworn, testified further, as follows:

(The Clerk) Mr. Musk you have been sworn previously this morning, you are still under oath.

That's Henry Musk.

DIRECT EXAMINATION

By Mr. Rosenthal:

Q. Now, Mr. Musk, you testified previously that you do, in fact, know the Plaintiff, Milton McCray? A. Yes.

Q. And are you familiar with the time in January of 1972 when Mr. McCray's mattress was afire? A. Yes.

Q. Do you remember the next time that you saw Mr. McCray after that fire?

(The Court) Wait a minute.

Familiar that his mattress was — January, what was it?

(Mr. Rosenthal) January 1, 1972, Your Honor, I'm sorry.

(The Court) All right.

By Mr. Rosenthal:

Q. Do you remember the time that you saw him thereafter? (384) A. I don't remember the day, I remember seeing him in the isolation area.

Q. Do you remember approximately how long aftwards this might have been? A. No.

Q. Now, for the record, I have never discussed this matter with you at any time, is that correct, other than just now in the presence of Mr. Morgan? A. Right.

Q. And would you please state for the record, or describe the physical condition of Mr. McCray at this time? A. The one thing that sticks out in my mind was on his forehead, it was either — I'm no doctor, but it either looked like an abrasion or a burn. In any event, the color of the skin was lighter there than on the rest of his face, so something was missing.

Q. And correct me if I'm incorrect, I think that you characterized this condition in front of Mr. Morgan and myself as a possible scrape? A. It could be, it could have been a burn, I don't know.

Q. All right.

Now, I show you if I may, from the file that you were using this morning, which is Mr. McCray's file pertaining to what? (385) A. Psychiatric and psychological records.

Q. And I show you a report dated June 20th, 1972, that we have, when I say we, you, Mr. Morgan and I have discussed, is that correct?

(The Court) June what?

(Mr. Rosenthal) The 20th, 1972, Your Honor.

(The Court) Ahuh.

By Mr. Rosenthal:

Q. You are familiar with this report? A. Yes.

Q. And it is initialed by whom? A. Dr. B. D. Smith, consulting psychiatrist.

Q. And you were present at the time of the interview with Mr. McCray which resulted in this report, is that correct? A. Yes.

Q. All right.

(Mr. Rosenthal) Your Honor please, we would ask that this be admitted into evidence as an exhibit, and we would also request that we have permission to photostat the same and furnish counsel for the Plaintiff with a copy and then introduce a photostatic copy rather than the records of the Penitentiary.

(Mr. Morgan) Your Honor, the Plaintiff has an objection to the admission of this report on the grounds of rele- (386) vancy.

This is — purports to be a, I believe this to be an accurate characterization of it, a three or four paragraph statement of what occurred at an interview where Mr. McCray, Mr. Musk, and Dr. Smith were present.

It's signed by Dr. Smith and states in the text that Mr. Musk was present.

The report was — not a report, really, just a statement of an interview — was dated June 20th, 1972, and although we haven't heard any evidence in this case, the only period of time of any relevance as far as the Plaintiff is concerned is that period of time between January 1, 1972 and January 3, 1972.

I would — I see no relevance that this statement of interview has to the case. Perhaps if Mr. Rosenthal could proffer the relevance and in some way tie it in to what his proposed defense is, then my objection would not be valid.

(Mr. Rosenthal) If Your Honor please, I think that the objection, if anything, would go to the weight of the evidence, rather than to the admissiblity itself.

I think it would be unfair to either party to introduce just a portion of the record, and there is a portion in this report pertaining to the fire which took place on January 1, 1972, which is one of the bases upon which the Plaintiff relies for his cause of damages.

(387) So, we would admit that it is relevant.

(The Court) All right, I will admit it, and I will give it such weight as it deserves, under the circumstances, considering the lateness of the report.

(Mr. Rosenthal) Thank you, Your Honor.

We would have no further questions of Mr. Musk.

(The Court) Well, what are you going—

(Mr. Rosenthal) I'm sorry.

(The Clerk) When you get the copies, I'll mark them.

(The Court) Let me look at it.

Have you seen it, Mr. Morgan, do you see anything in there pertaining to the fire?

(Mr. Morgan) Yes, Your Honor, there is one sentence pertaining to the fire.

(The Court) Let me see it.

(Handed.)

(Mr. Morgan) The sentence pertaining to the fire is in the final paragraph on the first page, Your Honor, and our position would be that the statement made there is merely what will turn out to be a cumulative statement.

(The Court) It doesn't really say anything, Mr. Morgan. I don't think it makes any difference at all, as you say.

I'll let it in, but it has very little weight as far (388) as this Court is concerned.

CROSS EXAMINATION

By Mr. Morgan:

Q. Mr. Musk, just a couple of questions.

Is it possible for you to place any more closely in time the incident you described where you had seen Mr. McCray in the isolated confinement area? A. I presume it was the week of January 4th, that was when I came back, I think, from holiday.

Q. Do you recall how you happened to see him? A. At that time, it was one of my duties to go regularly to the south wing and I was particularly interested in the people that were in the isolated area, as to why they were there.

(The Court) You say it was just after January 1st?

(The Witness) 4th.

(The Court) What?

(The Witness) 4th.

(The Court) And you had to go to the isolation area, what, once a—

(The Witness) Usually once a week.

By Mr. Morgan:

Q. And Mr. McCray just happened to be one of the residents that day and, as a result, you talked to him? A. Yes.

(389) Q. Did Mr. McCray say anything to you during the conversation? A. He complained about his medical treatment.

Q. Specifically, what complaint? A. That he wasn't getting the treatment, the proper treatment, he felt he wasn't being properly treated.

Q. Did he specify that? A. Yes.

Q. What did he mean by proper treatment, did he say what he meant by proper treatment? A. I think he said he hadn't seen a doctor.

Q. Did he say why he wanted to see a doctor? A. Because of the fire that he had been in and he didn't feel right.

Q. Did he say specifically how he didn't feel right? A. He was concerned about the condition of his skin.

Q. Did he say specifically anything about the mark that you referred to on his forehead? A. Not that I can remember.

Q. Did he say that that mark had been caused by the fire? A. This was — the mark on his head was my own impression, I did not discuss specifically any injury that was involved, just the part that I remember when I saw him.

Q. Could you describe it in more detail, first, how (390) large was it? A. Larger — about the size of a silver dollar, I guess.

Q. And where on his forehead was it? A. I think it was here, over the right eye.

Q. And I believe you testified that it was a lighter area than the rest of his face? A. Yes.

Q. Did it appear to be wet? A. It may have been, I don't remember.

Q. Did it appear to have a scab on it? A. No.

(The Court) What?

(The Witness) No.

By Mr. Morgan:

Q. Did it appear to be an open wound or — did it appear to be an open wound? A. Fresh.

Q. You testified, I believe, that you're not a doctor? A. Right.

Q. And that it was your impression as you viewed this wound that it could have been a scrape, or it could have been caused by fire, is that right? A. Or something else, I don't know. All I know, you know, it was there.

(391) Q. Did it appear it could have been caused by a blow to the head? A. I wouldn't know, I suppose, but I don't know.

Q. Did Mr. McCray have any other complaints to you concerning his health while you were talking to him? A. I think he complained about difficulty in breathing.

Q. Do you recall specifically what he said about that? A. No, just the complaint.

Q. What, if anything, did you do, Mr. Musk, in response to his request for medication, medical treatment? A. I informed the nurse, which is usual procedure, she then informs the doctor.

Q. Do you have any personal knowledge that she informed the doctor? A. No.

Q. Did you inform the nurse personally or— A. Personally.

Q. Personally? A. Yes.

Q. That same day? A. Yes.

Q. Do you recall the nurse's name? A. No.

Q. Would it have been Nurse Webber? A. It could have been Nurse Webber, or it could have (392) been Nurse MacKensie, either of those two.

Q. The conservation that you had with Mr. McCray in the presence of Dr. Smith on June 20th, which is the subject of the report introduced as evidence, what was your role during that conversation? A. More as an observer.

Q. Was the report written by Dr. Smith? A. Yes.

Q. Are the conclusions that are drawn in the report Dr. Smith's conclusions? A. Yes.

Q. The statements made by Mr. McCray in the report are Dr. Smith's paraphrasing of those statements? A. Yes.

Q. There was no recording made of this interview, I assume? A. No.

Q. Do you recall how long after the interview the statement was made, Dr. Smith's statement; do you know how long after the interview Dr. Smith's report was written? A. Oh, his usual procedure is to — I don't know if it was a Tuesday or a Thursday, a:.yway, but he goes home, he has a dictating machine at home and sometime during that week he dictates the reports usually.

Q. Did you talk to Mr. McCray at any other time (393) between January 4th, or shortly thereafter, and June 20th? A. Probably, but I don't remember.

(Mr. Morgan) Fine.

Thank you, Mr. Musk.

(Mr. Rosenthal) Mr. Musk may be excused, I believe, Your Honor?

(The Court) Yes, sir.

(Mr. Rosenthal) Thank you very much.

(The Court) All right.

Now, tomorrow we start out with the Burrell case, and, let's see, what time was the doctor coming?

(Mr. Morgan) The doctor will be here at 2:00 o'clock, Your Honor.

(The Court) All right.

Well, how much testimony have you got, how many people have you got coming in on this case?

(Mr. Morgan) Your Honor, I just have Mr. McCray to testify and Dr. Gould on his behalf.

(The Court) And what have you got?

(Mr. Rosenthal) We will have Mr. Burrell, Nurse Webber, and as far as I know at the present time, Your Honor, that's all.

Now, both of them will be here at 10:00 o'clock so that if the doctor is not here, if Your Honor does not mind (394) taking the testimony as we have in these cases out of order, then we can put on our case subject to any rebuttal after Dr. Gould testifies.

(The Court) All right.

Is that agreeable?

(Mr. Morgan) Well, I think the Plaintiff ought to testify first.

(Mr. Rosenthal) Yes, I mean after the Plaintiff testifies—

(The Court) Sure.

(Mr. Rosenthal) —but assume that the Plaintiff will not go through till 1:00 o'clock, we would be prepared to put on our witnesses and then have Dr. Gould testify when he gets here at 2:00.

(The Court) All right?

(Mr. Morgan) That's fine, Your Honor.

(The Court) All right.

(Whereupon, at 12:15 o'clock p.m., an adjournment was taken until Thursday, June 14, 1973, at 10:00 o'clock a.m.)

* * * * * *

(397) PROCEEDINGS OF JUNE 14, 1973

(The Court) Good morning.

Do you have your amended complaint?

(Mr. Morgan) Your Honor, I'm sorry, I don't, and I apologize for that, the reason is that I only have one copy of that complaint and somehow it got misplaced. I haven't had a chance to ask Mr. McCray, but possibly he picked up my copy last might and he has it in his file over here, but the only changes will be as we discussed and I should be able to have it by this afternoon, if not, certainly, tomorrow, but there won't be any surprises from our standpoint, we will abide by the agreement, agreed amendments.

(The Court) Be sure to get it in, Counsellor, will you?

(Mr. Morgan) Yes, sir, I surely will. We would have had it today, but we misplaced it.

(Mr. Rosenthal) Preliminary, Your Honor, we have the report of June 20th, 1972, which is one of the exhibits mentioned yesterday.

(The Clerk) That's in this case, Burrell?

(Mr. Rosenthal) That's correct.

(The Clerk) That will be Defendant's Exhibit Number 1.

(Document was marked Defendant's Exhibit No. 1.)

(398) (The Court) All right.

(Mr. Morgan) Your Honor, this is Civil Number 72-68-N, which is Milton McCray, Plaintiff, versus Robert Burrell, Defendant.

The substance of this case, Your Honor, is very simple, the facts are very simple, in any case.

Mr. McCray was a prisoner at the Maryland Penitentiary on January 1st, 1972, when there was a fairly serious fire that occurred in his cell on south wing. He was removed from his cell and upon the orders of the Defendant in this case, we believe, was removed to the hospital area of the Penitentiary, and particularly that area of the hospital known as mental observation, which are isolated confinement cells of the nature which Mr. McCray will describe in his testimony.

Generally, the cells are completely barren with nothing in them except for a hole in the floor and into these cells Mr. McCray was placed without any clothes for three days, during that time he never left the cell, and he had nothing in the cell with him during that entire period of time.

He did suffer serious burns as a result of the fire.

And we would show, first, that Mr. McCray was placed by the Defendant into the cell without any semblance of procedural due process, without any justification on the (399) part of the Defendant.

The Defendant had knowledge that Mr. McCray suffered burns and was seriously injured, yet without any assurance that Mr. McCray would receive medical attention while he was in, put him on MO, mental observation, nor any assurance that Mr. McCray receive any psychological or psychiatric assistance or attention while he was in mental observation.

Now, the basis of our claim, in addition to the Fourteenth Amendment, is the Eighth Amendment, and that is that the very conditions of the cell itself are cruel and unusual punishment. Not only is the cell significant punishment to justify a claim under the Fourteenth Amendment, but it is also substantively, in itself, cruel and unusual punishment in violation of the Eighth Amendment.

In this complaint, Your Honor, Mr. McCray is requesting compensatory damages for the injuries that he suffered, physical and mental injuries that he suffered as a result of being in MO, also compensatory damages for violations of his constitutional rights, he is requesting punitive damages from the Defendant inasmuch as the Defendant acted in contravention of rules and procedures of the Maryland Penitentiary which the Defendant knew or should have known were constitutionally prescribed, and, therefore, directly in violation of the constitution, and to his knowledge.

We would call as the only witness, as one or two (400) witnesses, excuse me, Your Honor, for the Plaintiff, the Plaintiff himself to testify. This afternoon at 2:00 o'clock, Dr. Gould, who is an examining physician, will testify on Plaintiff's behalf.

(The Court) Yes.

(Mr. Morgan) We would have no other evidence except what may come in through cross-examination and any possible rebuttal evidence that may be necessary, which we don't anticipate at this time.

(The Court) All right.

Now, Counsellor, you agree, don't you, that Mr. McCray will testify this morning and then we'll take

the other Defendant witnesses out of turn in order to expedite the trial?

(Mr. Morgan) Yes, Your Honor, that' fine.

(The Court) All right.

(Mr. Rosenthal) The defense has no opening statement, Your Honor.

(The Court) All right.

(Mr. Rosenthal) We would deny all of the allegations and feel that the evidence will so show, but no formal opening statement.

(Mr. Morgan) Your Honor, the Plaintiff will take the stand on his own behalf.

Mr. McCray.

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(401) MILTON McCRAY,

the Plaintiff, resumed the witness stand, and, having been previously duly sworn, testified as follows:

(The Clerk) Just be seated, Mr. McCray, you were sworn on Tuesday in these cases and you are still under oath.

That's Milton McCray.

DIRECT EXAMINATION

By Mr. Morgan:

Q. Mr. McCray, you are the Plaintiff in this case, is that correct? A. Yes.

Q. Mr. McCray, can you explain, or can you tell the Court what your present address is, what your present residence is? A. 954 Forrest Street, Maryland Penitentiary.

(The Court) Now, Mr. McCray, you've got to keep your voice up.

(The Witness) 954 Forrest Street, Maryland Penitentiary.

By Mr. Morgan:

Q. Are you serving a sentence, Mr. McCray? A. Yes, I am.

Q. On what date did you begin serving that sentence? (402) A. January 4th, 1969.

Q. How old are you, Mr. McCray? A. 33.

Q. Mr. McCray, I direct your attention to December 31st, 1971, were you in the Penitentiary on that date? A. Yes.

Q. In the evening of December 31st, 1971, could you explain what your activities were in the Penitentiary? A. December 30th?

Q. December 31st, 1971. A. Well, I was not — it was a holiday for my employer at the Maryland Penitentiary and he relieved me of my duties the day before, which was on the 30th.

Q. Well, Mr. McCray, excuse me, directing your attention to the evening of December 31st, 1971, where were you living in the Penitentiary at that time? A. In population.

The 31st?

Yes.

Q. On the evening of the 31st? A. The evening?

The evening, I was in south wing.

Q. That would have been the evening of December 31st? A. Yes.

Q. Do you recall what cell you were in at that time? (403) A. 325, I think it was.

Q. Do you recall on what day and at what time on that particular occasion you were placed in south wing in that cell? A. It was about 10:00 o'clock, 11:00 o'clock, I think it was, 10:00 or 11:00 o'clock that morning.

Q. That morning? A. Yes.

Q. On the evening of December 31st, Mr. McCray, did you sleep in that cell? A. On the evening?

Q. Of December 31st, 1971. A. If I'm not — I wasn't put into that cell until — if I'm correct, I was not put in that cell until that night. For some reason, it has been so far back, for some reason I was put in that cell that night.

Q. Do you recall approximately what time? A. Oh, it was about 6:00 o'clock.

Q. All right, sir.

Now— A. About 6:00 or 7:00 o'clock that night.

Q. When you were placed in the cell that evening, what, if anything, did you do? A. Well, I remember the officer, Mr. Plazio—

(The Court) What, now?

(404) (The Witness) Lt. Plazio brought me on the tier and placed me in this cell, and I mentioned to him about the cell being full of trash and blankets on the floor where some other inmate must have been in there using it as a rug, and that it was untidy, and I would like to have someone clean it up that particular evening, he told me that it was too late to get anybody to clean it up and for me to the best I can that night and next day I could sweep the stuff out and he would instruct the officers to clean that particular cell.

So, I did what I could, you know, took the old blanket and swept the trash up to the door, the blanket, and all excess paper that was there, and I laid down and went to sleep.

I didn't even get a personal clean blanket and sheet that particular night because there was none available, according to the officer on that particular shift.

By Mr. Morgan:

Q. Mr. McCray, when you were placed in that cell, what, if anything, was in the cell besides yourself? A. Well, there was a blanket, I think there was two blankets, old blankets on the floor, they were filthy, they seemed to have been used for a walking mat for some inmate that was in there before. There was paper behind the toilet. There was paper, newspaper piled in the corner. There was an old locker laying on the floor.

(405) (The Court) An old locker?

(The Witness) Yes, a metal locker that must have came out of some other cell because there was one locker on the wall and one on the floor in there.

I took the blanket, tore a piece of it off, and went to the sink and proceeded to sweep as much of the trash as I can to the door and pile it there, I couldn't sweep it out on the tier because there was too much, my intentions at the time were to leave it at the door and sweep it out the next morning when the tier runner comes around to clean the tiers.

I took a blanket and I wet it and cleaned up as much around the trash as I possibly could, and laid down and went to sleep.

By Mr. Morgan:

Q. Now, Mr. McCray, the next morning, which would have been January 1st, 1972, what, if anything, unusual happened to you? A. Well, I woke up that morning and I was feeling quite tense, I don't usually smoke as a habit, but I called down the tier, I think it was about two cells or a cell away, and asked him to give me a cigarette and a light, he throwed it down the tier, he throwed it out on the tier, I took a piece of newspaper, rolled it up and made an extension out of it and drug it in under the door, and I laid down (406) and proceeded to smoke, and I must have dropped off to sleep. I did, I went to sleep.

When I woke up, I felt some heat on my hand, on my right hand, and I jumped up all of a sudden and I was dazed from the quickness of my being, you know, waking up, and the cell was full of smoke and I was confused, I was trying to stump the fire out and I grabbed the mattress off the bed.

Q. Excuse me, Mr. McCray, if I may interrupt.

Where in the cell was the fire? A. The fire was at the door, right at the door where all this trash was.

Q. You may continue. A. I jumped up, I tried to stump the trash out, and that didn't seem to work. So, the next thing came to mind was to try to smother it,

and I grabbed the mattress off the bed and throwed it on the fire, and while it was — the cell at that time was quite full of smoke, and while trying to smother the mattress, the mattress caught afire, and the mattress seemed to — while I was trying to smother it, after a while the mattress got heated and I couldn't, you know, touch it too well.

So, I remembered there was a bucket in the cell, so I ran over to the sink, grabbed the bucket, and because the bucket was quite large it was hard for me to adjust the bucket into the sink and push the button and get enough water (407) to put out the fire in time.

So, I remembered the locker I had, sitting on top of the toilet, after a while when I was cleaning the cell up I had taken the locker off the floor and put it on top of the toilet, so I could clean the cell as much as possible, so I grabbed the locker and I broke the sink so that I could get the water into the bucket much faster.

So, I did get a bucket of water, throwed it on the fire, the fire seemed to burn just that much more faster, and the next bucket of water just didn't seem it was coming out fast enough, so in my haste, I tried to get as much as I can out of the toilet, the toilet had a little water in it, and dip down there, try to flush the toilet at the same time to get more water, but that didn't work, so I took the locker and I broke the toilet and pushed the bucket under the toilet as I flushed it and that seemed to fill the bucket up much faster, and by that time all the water that I could throw on there was just — was of no benefit, and I was becoming exhausted from inhaling the smoke in the cell, so my next result was to get under the sink as much as I could, push the button and let the water from the sink run down over my head and try to wet my clothes until someone come along and open the door.

I could hear from the outside the inmates hollering that there was a fire and I was hoping that as a (408) result of this that the officers would get there in time to get me out before the fire really got to me.

Q. Mr. McCray, what was the condition of the cell at this time? A. At which time?

Q. During this series of events you've described A. The cell was filthy. I thought it was a store room for trash when I first went in, and I made this known to the officer, but he said this was the only cell available at that time, or he just didn't want to move me to another cell, he told me to clean it up and next day he would try to get a tier runner to remove the trash.

(Mr. Morgan) Your Honor, if I might lead the witness slightly just to develop the testimony.

By Mr. Morgan:

Q. Mr. McCray, with regard to the fire itself, what was the condition of the cell at this time, during the time that you were trying to put out the fire, during the time the fire was in the cell, could you describe, for example, the extent of the fire, any smoke that may have been coming from the fire, what you were experiencing as a result of the fire? A. Well, when I woke up, all of a sudden, I was dazed and the cell was quite full of smoke and I was trying to get myself together and put the fire out all at the same (409) time, and I just couldn't, I just, you know, I've done this before when I wake up all of a sudden, it's just hard for me to get myself together to the point I can realize exactly what's what, and when I did, got myself together, while stumping the fire out, too, the fire was at a stage where I couldn't do too much with it, and the only thing that I could think of to do was try to smother it before I went to try to get the water. The water was of no help.

Q. Mr. McCray, you testified that after — when you fell asleep, or you testified you did fall asleep and then woke up sometime later with a burning or a hot sensation on your hand? A. Yes.

Q. Could you describe exactly where you were in the cell at the time you went to sleep? A. I was laying in bed.

Q. All right.

Now, where is the bed in the cell? A. Well, the bed is on the—

Q. I suppose— A. —left-hand wall of the cell.

Q. Is that as you're looking into the cell? A. Looking into the cell, as you look into the cell the bed is on the left-hand wall, yes.

Q. I see.

(410) Mr. McCray, are you right-handed or left-handed? A. Right-handed.

Q. In relation to the bed, Mr. McCray, where is the door of the cell? A. It's on the — it's at the head of the bed.

Q. At the head of the bed? A. At the head of the bed, yes.

Q. Was it to the right or left of the bed? A. To the right.

Q. Now, I believe it was your testimony, Mr. McCray, that the trash in the cell that you described, you swept to the front of the cell, is that correct? A. Right, to the door, with intention of sweeping it out on the tier the next morning when the tier runner come by.

Q. I see.

Now, as you were lying on the bed, were you lying with your head into the cell or your head out toward the door? A. My head was at the head of the bed, toward the door.

Q. Mr. McCray, you said you heard hollering outside the door of the cell, did there come a time when you were let out of that cell, or that you got out of the cell? A. Got out — during the time that I was fighting to (411) put the fire out, an officer ran up to the door, and he ran back,I don't know whether he had anything with him or not, but he ran back and that's the only time I remember seeing an officer, you know, during the time I was trying to stump the fire out, and with the mattress and my feet, and the water, an officer ran up to the door and he ran back down the tier for some reason, I didn't see an officer no more until after, oh,

about, it looked like about 15, 20 minutes later when they did finally try to open the door and let me out.

Q. You were let out? A. About 20 minutes later, they let me out, after they had gotten a fire extinguisher to put it out, after the second time they got a fire extinguisher.

The first time they came down with a fire extinguisher, it wasn't working. The second time they came down they had — I heard this later — they had to go all the way to the powerhouse to get that one.

Q. Now, Mr. McCray, when you came out of the cell, what was your physical condition? A. I was burnt, I was in pain, I was — I had smoke in my lungs, I could barely breathe, I was coughing, I could barely stand up.

Q. Where were you burned, Mr. McCray? A. On my face, on both hands, I had — well, mainly (412) my face and my hands.

Q. Were your clothes burned? A. Yes, and on the — I think I got burned on the arm, my right sleeve was burned, and I think around my pants legs, burned a little.

Q. Mr. McCray, I believe you testified that from the time the fire started until the time you were released from the cell, it was approximately 15 or 20 minutes, is that correct? A. It seemed much longer than that, but I would say 15 minutes.

Q. That's an estimate on your part? A. Yes.

Q. All right, sir.

After you were released from the cell, Mr. McCray, what occurred, if anything, at that time? A. Well, the officers got me out of the cell, took me in the south wing area, and they were all laughing, chuckling, and they stood me in front of a light, took a picture of me, and I think the Wing Officer said, take him down the hospital, and I was taken down the hospital, and I saw Mrs. Webb, or Webber, and I think it was Sgt. Martin.

(The Court) Saw Mrs. — what is the name?

(The Witness) Webber or Webb, I don't know.

(Mr. Rosenthal) For the record, Your Honor, it's (413) Nurse Weber, W-e-b-e-r.

(The Witness) She applied — she washed my face, or had an inmate wash my face, and she gave me some type of cough medicine, I've had the medicine since then and it was given to me for a cold.

And—

(Mr. Rosenthal) Your Honor please, I object to the last statement, that the medicine was given to him for a cold, unless he so can follow up on that statement.

(The Witness) Well, I can, this is a fact, that same medicine since then.

(Mr. Rosenthal) Oh, since then.

I'm sorry, I thought you meant, the time you were given that medicine for a cold.

(The Witness) No, I had some red medicine they gave me and it's for a cold.

By Mr. Morgan:

Q. It's a liquid medicine? A. A liquid medicine.

Q. Mr. McCray, at any time during the series of events that you've described beginning on the evening of December 31st, 1971, through the time that you were in the hospital on January 1st, 1972, and I assume that that would have been the morning of January 1st? A. Yes.

(414) Q. At any time during that period, did you see the Defendant, Mr. Burrell? A. Well, after I was placed — after I was taken to the hospital, Mr. Burrell showed up, and while the nurse was — while the inmate was washing my face and applying this solution, she was inquiring where was I burned, and I told her, and I think I saw him standing over to the side.

Q. Did Mr. Burrell say anything to you at that time? A. No, he was just standing there, you know.

Q. Did he ask you about the fire? A. No, he said nothing to me about any fire.

So, after Mrs. Webb finished administering the — the inmate finished washing my face and giving me the

medicine, I think Mrs. Webb suggested I be put into a locked cell that they usually have for guys that come up from the south wing, and Mr. Burrell said, put him in MO.

(The Court) In what?

(The Witness) MO, that's medical observation cell.

Well, two officers took me up and they placed me in — took off all my clothes that I had, which were burned, and proceeded to put me into this MO cell, and I asked, I said, am I to get a shower, because my whole body was full of smoke, et cetera, and I would like to have a shower, at least before I go in the cell. They told me that I would have to wait until I see the doctor before anything can be done because (415) of my burns.

So, I was placed in the cell, and after I got in the cell, I saw the condition of the cell and I called out the door to the officers and asked them was they going to try to clean this cell up, because the hole that was in the floor that is used for a toilet had excrement all around it where some inmate must have missed the hole when he was taking care of his privates, and he told me that they would send someone, an inmate, in later and advise the officer in charge of MO to have somebody clean it up.

This was never done.

Well, the whole time I was in MO for those few days—

(The Court) How long were you in there?

(The Witness) I think it was — I stayed in there about two days.

An inmate, friend of mine, saw the condition that I was in and he asked me did I know the phone number of my mother and that he would—

(Mr. Rosenthal) Your Honor please, for the record, we voice an objection to the conversation between the other inmate and—

(The Court) All right, just tell what happened, Mr. McCray.

(416) By Mr. Morgan:

Q. You said you spoke to another inmate? A. Yes.

Q. And what did you say to the other inmate? A. Well, he asked me—

(Mr. Rosenthal) Well, again, Your Honor—

(The Witness) What did I say to him?

By Mr. Morgan:

Q. Mr. McCray, the Defendant objects, so you can't testify to anything the other inmate said to you, you can testify to what you said to him. A. Well, I told him—

(Mr. Rosenthal) Well, I'm not so sure of that, either, Your Honor.

(The Court) Why don't you testify as to what happened?

(Mr. Rosenthal) That's all.

(The Court) What did you do, did your mother come there, or what?

(The Witness) Yes, my mother came, my mother called to try to find out what was the reason for me being in MO, and that she heard that I was burned pretty bad as a result and that I wasn't receiving proper medical treatment, and the next day, I think it was, I was — I can't say what I was told — well, the next day, Capt. Burrell, I heard an officer (417) of the tier say that — tell one of the other inmates that I—

(Mr. Rosenthal) Again, Your Honor, may counsel approach the Bench, Your Honor, I hesitate to object because I want to give Mr. McCray as full a hearing as possible, but, on the other hand, we do have Mr. Burrell here and I am here today to represent his rights, and for that reason I do object to any conversations with other inmates or anyone else who are not here.

(The Court) That's correct.

Just tell what happened, Mr. McCray.

By Mr. Morgan:

Q. Mr. McCray, let me ask you some more direct questions and perhaps we can avoid that problem.

Going back to the point at which you were placed into the MO, or medical observation. A. Yes.

Q. As you understand it to be, the cell.

You testified that your clothes were taken off, is that correct? A. Yes, they were taken off me.

Q. All your clothes? A. All.

Q. Can you recall approximately what time of day this was on January 1st? A. That morning, about maybe 9:00 or 10:00 o'clock, (418) at the time in south wing, in that area, you very seldom can keep up — I would say that morning, how close to 12:00 or 8:00, I couldn't say, I'll say approximately 10:00 or 10:30.

Q. Now, do you recall what day you were released from the mental observation cell? A. That was about two days later, I think.

Q. All right, sir.

Now, during that period of two days, did you ever have clothes to wear in the cell? A. Oh, no, none at all.

Q. All right.

Now, when you were placed in mental observation, you testified as to one aspect of it, the cleanliness of it.

Can you describe every other aspect of the cell that you can recall when you entered it that day? A. Well, it's the — well, this particular cell is the only cell, Number 8 Cell that I was put in, had a big sheet of metal over the window, no windows to the cell, just four walls and a hole in the floor, and the outside door and the inside door, one that's wood, the solid door, the other one is just the bars.

Q. Were either or both of those doors closed while you were in the cell? A. Well, when I first went in, they closed the— (419) after I was trying to — they locked the steel door, the metal door, and when I started to request my showers and seeing a doctor, they locked the outside door, and that stayed locked until the time for them to feed up the inmates, the food, at that particular time.

Q. How large is the hole in the floor you described, Mr. McCray? A. The hole in the floor is about six or eight inches round.

Q. Is it exactly in the center of the cell, or is it to one side? A. To the side, just as you go in the door, it's sitting in the floor.

Q. Is there anything over the hole? A. There's a metal plate with holes in it, you know, you have to adjust yourself to do your own private.

Q. Was there any toilet paper in the cell? A. No, no toilet paper.

Q. Could you describe the construction of the walls? A. The walls were all concrete, cement walls, the floor was tile, and that is all.

Q. What color were the walls, Mr. McCray? A. I think they were red.

Q. Is there a light in the cell, Mr. McCray? A. Yes, there's a light there, I remember the light (420) being on that night, it was turned on that night.

Q. Now, during the two-day period that you were in MO, Mr. McCray, was there at any time anything in the cell with you other than what you've already described? A. They would not give me anything except for the food that they brought by and shoved through a hole, that was all.

Q. How many nights did you spend in the cell, Mr. McCray? A. Two nights, I think it was, two or three nights.

Q. Did you sleep during those nights? A. Oh, no, it was impossible to sleep; how can you find a soft spot nude on a cement floor? You can't sleep at all. You might doze off, but I stood up most of that night, the floor was cold.

Q. Mr. McCray, at any time during the period when you were in MO, did you see the Defendant, Mr. Burrell? A. He never came back in the observation area that I saw him. The first and last time I saw him that time was when I was being administered medicine.

(Mr. Rosenthal) I'm sorry, would you repeat that, please?

(The Witness) The first and the last time was when I was administered medicine in the dispensary.

By Mr. Morgan:

Q. Mr. McCray, at any time during the period when you (421) were in MO, were you visited at your cell by anyone? A. No one.

Officers came by about three or four times a day, or maybe an inmate was to make a lot of noise he may come back, and each time I asked him, I tried to get some medicine for my throat because I was at that time coughing up quite a bit of black solution, phlegm, and I showed him this, I had a whole cupful, and I figured that the only way I could keep him coming near me was to every time I called for help, just spit it into this milk carton that they had given me, you know, of milk, and I had a whole cupful, and I showed it to the officer and told him that I had to have something, you know, to try to clear my throat up, or I had to see a doctor, and each time he told me he was under orders not to give me anything until I saw a doctor.

Q. Did you ever see a doctor, Mr. McCray, while you were in MO? A. I never saw a doctor while I was in MO.

Q. Aside from the time you've already described when you saw Nurse Weber, did you ever see Nurse Weber, or any other nurse, while you were in MO? A. No doctor or nurse came to see me while I was in there. I asked many times to see a doctor because of the pain I was in as a result of the burning on my face and hands and because of the difficulty I had breathing during that (422) time.

Q. Do you know Dr. Campbell, Mr. McCray? A. Yes, very well.

Q. Did you know Dr. Campbell at this time? A. Yes.

Q. During the period of time when you were in MO, did you see Dr. Campbell? A. Not once.

Q. He never came into MO to talk to you? A. He never talked to me.

I don't think he was even on that day.

Q. Mr. McCray, are you familiar, or at that time were you familiar with the adjustment or disciplinary procedures at the Penitentiary? A. Yes.

Q. You were familiar at that time with a notice of offense? A. Yes.

Q. Were you familiar with adjustment team hearings? A. Yes.

Q. All right.

Nor, at any time, did you receive a notice of offense concerning any of what you've described today? A. Burning in the cell?

Q. That's right. (423) A. Yes.

Q. Do you recall when? A. No. That was sometime after when I was placed — after I was removed from the south wing, I mean, was taken back to south wing, I think maybe 15, 20 days.

Q. Did you receive the notice while you were in MO? A. No, I definitely didn't receive it.

Q. Now, did you have a disciplinary or adjustment hearing as a result of that charge? A. Yes.

Q. What was the disposition of the charge? A. I was given 30 days, I think it was, I was charged $80.00 for the destruction of the sink and the toilet, I think it was. That was the only property that was destroyed at that time.

Q. Mr. McCray, I have two documents I'll ask if you can identify.

The first is a handwritten letter, can you identify that? A. Yes, I sent one to—

Q. What is that? A. This is a letter to Mr. Hawkins, Col. Lally, Chief Judge Northrop, Judge Roszel Thomsen, Mr. Jordan, and a Mrs. Deborah Bollmer, B-o-l-l-m-e-r.

Q. Did you write this letter, Mr. McCray? (424) A. Yes, I did.

Q. All right.

Now, can you identify the other piece of paper? A. Yes.

This is a letter from Mr. Hawkins to me.

Q. Did you actually receive that letter? A. Yes.

Q. All right, sir.

(Mr. Morgan) We would move to introduce these as Plaintiff's Exhibit Number 1.

(Mr. Rosenthal) As I understand, Your Honor, these are in the Plaintiff's file.

(The Court) What?

(Mr. Rosenthal) Are in Mr. McCray's base file.

(The Court) All right.

(Mr. Morgan) These are part of his institutional record, Your Honor, that we discovered through the production of documents.

(The Clerk) Plaintiff's Exhibit Number 1, letter from McCray; and the reply letter to McCray is Plaintiff's Exhibit 2.

(Documents were marked Plaintiff's Exhibits Numbers 1 and 2.)

(The Court) To Mr. McCray is Exhibit 2?

(The Clerk) Letter to McCray.

(425) By Mr. Morgan:

Q. Mr. McCray, do you know Dr. Gould? A. Yes.

Q. Did you know him at this time? A. Yes.

Q. At any time after this incident of your being burned in your cell, did you have occasion to see Dr. Gould? A. Yes, 13 days after, on the 13th of January was the first time I saw Dr. Gould.

Q. All right, sir. A. But the first time, that's the first time after this.

Q. That's right. A. Yes.

Q. Mr. McCray, during the period of time that you were in MO, were you at any time removed from MO? A. No. Not even for a shower that I requested each of those days that I was up there.

Q. From, as I understand your testimony, from the time that you were placed in MO, the morning of January 1st, 1972, until the time you were released, which as you testified was approximately two days later, you were not released from that cell at any time, is that right? A. No, I wasn't.

Q. And I believe it's also your testimony that during (426) that period of time there was never anything in that cell with the exception of yourself, is that correct? A. That's correct.

Q. There was never any physical item of any kind in the cell with you? A. Nothing at all. I couldn't even get toilet paper in the cell.

Q. Mr. McCray, again directing your attention specifically to that two-day period that you were in MO, what was the injury — what, if any, injury, as a result of the fire, did you have to your body? A. My hands were burned, and both hands were burned as a result of me trying to put the fire out, and my face was burned, mostly from the heat of the cell, all over my face was quite burned, and the whole time I was in MO all I could do was think about how much I was suffering and there was just nobody I could call to bring that fact to their attention, or cared enough to at least try to give me some type of relief or to give me something that would ease some of the pain I was under.

Coupled with the fact that I was on that floor trying to sleep those few nights with nothing.

I recall breaking down a couple of times there during the night when I couldn't sleep, twisting, turning, when I would lay on my hand and feel the pain from it, (427) breaking down and crying, not so much because of the pain, but because I just couldn't get anybody to do anything for me at a time that I really needed something done.

(Mr. Morgan) Thank you, Mr. McCray.

I don't have any other questions.

CROSS EXAMINATION

By Mr. Rosenthal:

Q. Now, Mr. McCray, prior to being placed on the south wing on December 31st, was it? A. Yes.

Q. You were in the general population? A. Yes, I assume that.

Q. Do you recall why you were placed in the south wing? A. Let's see. I think so, yes.

Q. Why was that, sir? A. On December — going back to December 30th, I was working in the library during that time, and on December the 30th, my employer told me that — told me and the other inmate, the librarians, that we were not — the library was closed and we were not to report to work that next day.

So, on the 31st, that morning, the policy of the institution is that you report to work every morning, but when you're not supposed to work, you don't have to report, you know.

(428) I just got in the institution around that time.

So, instead of me going to report to work that morning, I went to the print shop and was talking to one of my friends, not my friend, my brother-in-law, and I think I stayed down there, supposed to go in 8:30, 9:00 o'clock, and during this time the officers that was running the school must have called the Captain, told him that I hadn't reported to work, and they, in turn, must have been looking for me, I think about 15 or 20 minutes, and when they did find me I was at the print shop talking to a friend of mind, this officer escorted me to the Captain's office, and he asked me why I did not report to work, and I explained to him that my employer told me that he was going to be off the next day, the library was going to be closed and there was no use of me reporting to work that next morning.

The Captain, in turn, ordered me locked up. I, of course, told him that this was unnecessary since the next day was a holiday and all he had to do was call my employer up and ask him whether or not he instructed me not to report to work that next morning.

He wouldn't consider that, he just said, lock him up. So, I was placed in south wing.

I think that's the incident that caused me being locked up on the south wing.

Q. Now, who was your employer, sir? (429) A. Mr. Brown.

Q. I'm sorry? A. Mr. Brown.

Q. Is he still at the institution? A. Yes, he is.

Q. Now, what is a count-down, are you familiar with that term at the Penitentiary, or a count? A. Not personally. I assume that it means that they count the inmates that's in the institution, on jobs, or — et cetera.

Q. And isn't this what you were charged with, failing to be at a count? A. As a result of that incident, yes, at the print shop.

I was later found not guilty of it, because my employer came into the disciplinary board and testified just what I just testified to, they found me not guilty because he said that he did instruct me not to report the next day.

Q. And so, you protested when you were placed on the south wing, is that what you just testified? A. Protest?

Q. Protested, you were upset? A. I didn't like the idea of being placed on the south wing, but as far as protest, no.

Q. I thought you said you protested because you told— (430) A. When I say protest, I mean verbally express my dislike for being placed on south wing for something I was not responsible or guilty of.

Q. And you were upset about this because you felt it was unfair, is that correct? A. Not upset, I just didn't like it.

Q. And then you were taken to the south wing, is that correct? A. Yes.

Q. And you had your clothing with you at that time, that you were wearing? A. Yes.

Q. Now, Mr. McCray, you state that the bed is on the left-hand side of the cell as you're looking through the door, is that correct? A. Yes.

Q. Now, isn't it customary for the inmates to sleep with their feet towards the door and their head away from the door, at the far end? A. No. All the inmates I know sleep with their head toward the door, because the door, where it's a big metal plate, the door is the only opening to the cell, it's a big plate that your head is against, your head is not exposed to any danger.

Q. Did you have a pillow? (431) A. No, no pillow was there, that I saw, no. There's usually no pillows in any of those cells over there.

Q. Now, you slept there the evening of the 31st, is that correct, sir, or you were in the cell, whether you slept or did not sleep? A. I was not in that cell the evening of the 31st, I wasn't put in that cell until night, sometime, I don't know exactly where I came from or— but I do know that I was put in that cell that evening because I remember telling the officer that I wanted the tier runner to clean the cell up, and he said it was too late to clean it, and he told me to do the best I could with it until the next day.

Q. Do you remember the date of the first evening that you slept in this cell in the south wing? A. That was the night of the 31st.

Q. All right, of '71? A. 1971.

Q. Do you recall what day of the week this might have been, if you recall? A. No, I don't recall the day, no. I know it was the day before New Year.

Q. All right, and, as I understand it, you swept all this trash towards the door, is that correct? A. Right up to the door.

Q. It was directly in front of the door? (432) A. Right in the opening there.

Q. And the next morning, was your breakfast served? A. Yes, it was.

Q. And do you know of any reason why this trash was not removed at that time? A. Because no one was available.

Q. I'm sorry, I didn't here you. A. Because — no, there's no reason why — yes, there is a reason, I can't sweep it out while the food cart is coming down the tier, have to wait until after all the food has been given out and then the tier runner comes along after everybody eats they have to — their usual policy is to take the plastic containers and throw them out on the tier and then the tier runner comes along and cleans this up.

Q. Now, what time is breakfast served? A. About 9:00 o'clock, 8:00 o'clock, 9:00 o'clock, 9:30, they serve whenever they get time in the morning, it's usually before 10:00 o'clock.

Q. And what, if anything, did you do with your breakfast utensils or trash, or whatever it may be called? A. I don't know if I throwed it out on the tier, or whether I just dropped it right at the door until the tier runner came by and I could hand them out to him.

Q. But it is possible you placed them out on the tier, is that correct, slide them back under the barred (433) door? A. No, you have to pick these things up and it's too small, too low for you to shove it under the bar, you can just barely get your hand, your finger through the bars, the opening is just big enough — oh, it's about two and a half inches high anything through there, so you have to force these things through this hole.

Q. Are you talking about at the bottom of the door? A. I'm talking about where they put the food through the door, the bottom of the door is too close.

Q. How does the food come into your cell? A. It comes through the food slot, just about two and a half inches high and about 13 inches wide.

Q. So, if it comes through the food slot, it can also be pushed back out through the food slot? A. Same thing, yes.

Q. Well, why couldn't the rest of your trash in the cell be placed through this food slot, if it was newspapers? A. No reason why it couldn't, except for the fact that I couldn't push it out there until it was time for the tier runner to come along and clean it up.

Q. Well, how do you know what time he comes by? A. When he comes down the tier.

Q. And you can't put your food tray, your empty food (434) tray back through the slot until he comes back down? A. I don't know. I can, but—

Q. But you didn't? A. I didn't, yes.

Q. So, it's your testimony, if I understand it, that you could have placed your food untensils back under the food slot along with some or all of the trash prior to the time of the fire, is that correct? A. Yes, I could have, yes.

Q. All right.

Now, Mr. McCray, as you were allegedly smoking, what was your position in bed, were you laying on your back? A. Laying on my back.

Q. And tell us briefly exactly how you were smoking. A. Laying on my back with a cigarette in my hand, smoking.

Q. And the cigarette was in your right hand, is that correct? A. Ahuh.

Q. Now, what is the distance between the wall, the cell wall which has the door in it— A. Yes.

Q. —and the beginning of the bunk? A. About — you mean—

Q. Let me give you an example, if I may. (435) A. Yes.

Q. If this represents— A. Could you draw a picture?

Q. No, let me give it to you this way, I think it would be easier to understand.

For the record, if the table at which the Defendant is seated, represents the door of the cell— A. Right.

Q. —how far back would the bunk be, would it be from this table to this table? A. I can give it to you right here.

(Drawing.)

This is a door. This is the bunk, I'll say the bunk is sitting here, it's set about right here.

This is the way it is, this is the door here, this is the door, this is the bunk.

Q. That's right.

Now, what is this? A. This is metal here.

Q. Let's forget this. A. Right.

Q. This is the door that someone would come in? A. Correct.

Q. And this is the beginning of the bed? A. Right.

(436) Q. Now, what is the distance between this door, the wall holding the door, and the bunk, or bed about 18 inches, 24 inches? A. This is awfully close, about six inches.

Q. Now, is the bed in such a position that if someone placed their hand through the bar, they would touch you? A. It's impossible to get your whole hand through that bar.

Q. Okay.

How long after you had breakfast did you start smoking? A. I can't remember whether I actually — it was after breakfast or before breakfast, but I would say, just offhand, it was after, and it wasn't very long, because the tier runner hadn't come by, I was positive of that because I was waiting for him, I was waiting for him to come by so I could shove the trash out, and it couldn't have been very long.

Q. Now, what is the first thing you did immediately after you realized there was a fire? A. I tried to stump this fire out.

Q. And you do acknowledge that you took this cabinet and broke your sink and the toilet? A. Yes.

Q. There's no question about that? (437) A. No question at all.

Q. Now, did you ever have any showers while you were on mental observation? A. None.

I have never had a shower, even mental observation or south wing, other than showers that they give just on Saturday, regardless of Dr. Gould's prescription, prescribed — prescription prescribing, actually ordering that I should have a shower every day, no one would give me a shower and I have made many requests for that.

Q. All right.

Now, you also testified, as I understood it, that the only time you ever saw Mr. Burrell was the one time at the dispensary? A. That was the only time.

Q. Did you receive any medication while you were on mental observation? A. The officers I asked about medication told me that they were not to give me anything until I saw a doctor, they were at orders not to give me anything, I don't know who the orders was handed down by, but they told me, upon each request that I made, and I made them at every opportunity I got, that I was not to have anything until the doctor saw me.

Q. Then if the records of the Penitentiary relate that (438) you did have medication, are you still denying that you had medication? A. Yes. If the records of the Maryland Penitentiary state that I got medication during that time, I will deny it, it was not given to me.

Q. Do you recall hitting the wall or door, or anything else, with your fists when you were in the mental observation section? A. No.

Q. Do you remember skinning your knuckles by hitting on the grill door? A. No.

Q. So, if there's a report of that in the institution records, that, also, would be false, is that what you're saying? A. Yes, I am saying that.

Q. And let me ask you this question, Mr. McCray, with reference to the letter that you sent in to the

various people, that's in as Exhibit Number 1, it's dated February 15th, is that correct; I mean, I'll show it to you, this does say February 15th, is that correct? A. Yes, it does.

Q. And when did you have your hearing for the destruction of this property? A. I don't recall exactly what date, I know I did (439) have a hearing.

Q. It would have to be after the fire, is that correct? A. After the fire.

Q. The fire was on January 1st, is that correct? A. Yes.

Q. And, therefore, between January 1st and February 15th, the maximum time— A. I had to have a hearing, yes.

Q. —would be 45 days during that period, 30 days in January, and 15 in February? A. Yes.

Q. And you have in your letter 55 days, I assume that that is an unintentional mistake, is that correct? A. 55 days, yes.

Q. But, at most, it would be 45 days, and even then, you could not have been placed in segregation until after your disciplinary hearing, isn't that correct? A. Couldn't have been what?

Q. You had a hearing, you were complaining in this letter about the hearing— A. Yes.

Q. —in which— A. Right.

Q. —you received six months and an $80.00 fine. (440) A. Yes.

Q. That hearing had to take place after the fire and prior to February 15th? A. Yes.

Q. Now, Mr. McCray, isn't it a fact that you were upset about being placed in the south wing because you felt that you had been wronged? A. I don't think anybody—

(Mr. Morgan) Your Honor, I object to that, unless it's placed in time.

Wait a second, Mr. McCray.

I think there should be a specific time we're talking about on that.

By Mr. Rosenthal:

Q. Isn't it a fact, Mr. McCray, that on December 31st, 1971, when you believed that you were off, and you were brought in and taken to the south wing, that you were very upset because you thought you had been wronged? A. I didn't like the idea, I would say that I difinitely didn't like it.

Q. And isn't it a fact that you set this cell on fire? A. It is not a fact that I set that cell on fire.

(Mr. Rosenthal) I have no further questions, Your Honor.

(441) REDIRECT EXAMINATION

By Mr. Morgan:

Q. Mr. McCray, to qualify your last statement, would it be your testimony that you did not set the cell on fire purposely, you're not suggesting someone else set the cell on fire, are you? A. To tell the truth, I don't know how the cell got on fire, but I assume from the fact that I was smoking at that time that the fire was started as a result of the cigarette, but if somebody stuck a match in there and started it, I don't know, but I would assume this, I would just say the most logical reason for it being started was as a result of this cigarette.

Q. Okay, sir.

Mr. Rosenthal cross-examined you quite extensively on the question of your pushing this trash out onto the tier. A. Yes.

Q. For the tier men to pick up.

I'm wondering if there's any regulation on the south wing, or if there was any regulation at that time, rather, concerning the procedure for pushing trash onto the tier to be picked up? A. It's a fact, if you was to push trash out on that tier after — during times that the tier runner has not (442) cleaned the tier or before the times for him to clean up, because they come by every morning to clean the tiers up, and they clean it up again at noontime, and again at 4:00.

Now, any excess trash on the tier between those hours, you're subject to a ticket, because not only that, you become an enemy of the tier runner and he doesn't like it and he personally comes down and expresses his dislike for making extra work for him, so that it is one of the main reasons why I did not push trash out on the tier, to avoid giving the tier runner extra work, and the tier runners can be a great help to inmates when they're in those cells, errands from one cell to another, and that's one of the main reasons why I did not push this trash out on the tier, I mean, during times that I know that the tier runner was not there.

Q. By a ticket, do you mean a notice of an offense? A. Right.

I have swept trash out on the tier at night and have the officer come by and make me put it back in.

Q. I see.

Mr. McCray, you testified and admitted, in fact, breaking the sink and the toilet with the cabinet in your cell? A. Yes.

Q. All right.

(443) I believe you testified on direct examination that there were two cabinets in your cell, is that right? A. There were two.

Q. And I believe you testified that there was one cabinet that was attached to the wall and that there was one cabinet that was lying on the floor— A. Yes.

Q. —is that right? A. This was a regular—

Q. Now, which cabinet did you use to break the sink and the toilet? A. The one that was — it wasn't on the floor at this time because I had taken it off the floor and put it on the toilet while cleaning the cell that night, and it was available to break the sink to make it easier for me to get the water for the fire.

Q. Did, at any time while you were in the cell, did you take the cabinet that was attached to the wall off the wall? A. That was impossible to smash one of those cabinets off that wall.

(Mr. Morgan) Okay, sir.

RECROSS EXAMINATION

By Mr. Rosenthal:

Q. How high is the cabinet, Mr. McCray? (444) A. I would say about 10, 12 feet, about 10 feet, about if I stand up, I would be able to reach on top of it, yes.

Q. And how was that held to the wall? A. It's bolted to the wall, or welded, one of the two, it's bolted, more or less.

(Mr. Morgan) This is redirect, right?

(Mr. Rosenthal) Right, you asked him about the cabinet.

(Mr. Morgan) Well, I hadn't finished.

(Mr. Rosenthal) I'm sorry, excuse me, I thought you had finished.

REDIRECT EXAMINATION (Resumed)

By Mr. Morgan:

Q. Mr. McCray, you testified that when you were in MO you were told by the Correctional Officer that you would not receive anything until you saw a doctor, is that correct? A. He didn't give me anything, not even — I asked him for cough drops, I thought that would be a simple request, and he told me he couldn't even give me cough drops.

Q. And it's your testimony that during that period of time, I believe, that you did not see a doctor, is that correct? A. I did not.

(445) Q. Mr. Rosenthal asked you if Maryland Penitentiary records would indicate that you received medication during this period of time, you stated that those records would be wrong? A. Yes.

Q. Now, on direct examination, you did testify that when you initially came to the hospital area, you did get some medication, isn't that right? A. Oh, when I answered his question I meant during the time I was — after that particular period, I didn't mean to include that as an answer to his question.

(Mr. Morgan) All right.

Thank you, Mr. McCray.

RECROSS EXAMINATION (Resumed)

By Mr. Rosenthal:

Q. Mr. McCray, getting back to the trash, you said you would receiv a ticket if you put it under the door, is that correct? A. Not necessarily, but there was a possibility, I've known inmates that has been given a ticket or reprimanded, one of the two, either by the tier runner or the officer, and you can't afford to rub either one wrong in that particular environment.

Q. Now, tell me, if you will, you mentioned that there was some trash there and some newspaper? (446) A. Yes.

Q. Now, I don't mean to be repetitive, but how much newspaper was in there, one day's newspapers, ten days? A. Oh, no, it was just — newspaper piled in the corner, the one behind the toilet was all balled up, the one that was sitting on top of the mattress, I mean on top of the blanket that was on the floor, looked like paper that somebody had stored in therefor maybe reading purposes, et cetera, he was taken out of the cell, and that—

Q. Were there any cartons in the cell? A. Food containers, yes, there was food containers that had been eaten out of and not — everything just throwed over in the corner on the floor. The cups that he drunk out of was piled back there. Many of the food containers they used — were used for something like a chair by the inmate, you know, to sit on it, because they don't have a chair in the cell, and they get — the tier runner gives these containers out monthly and they use them to sit on, and they were stacked up about 18 inches high.

Q. After this trash caught on fire, you threw the two blankets on— A. No, the two blankets were at the door, and the newspaper and the containers and all were shoved up to the door as a result of the night before, semi-cleaning I had.

Q. Were the blankets folded when you put them up (447) against the door? A. No, they were filthy, I just kicked as much of the heavy stuff to the door, and the rest I took a piece of paper, or one of the cartons, and scraped the trash up to the door.

The balance, I cleaned as much of that as I possibly could.

Q. And the mattress, you threw on top of the fire after it started and you couldn't control it? A. When I couldn't control it, I grabbed this mattress and I tried to smother it, and the smoke and everything was — had me just about exhausted by that time, that's when I tried to use the water.

(Mr. Rosenthal) I have no further questions, Your Honor.

(The Court) All right.

(The Court) Have you all got the stipulations in reference to the record that you were speaking about?

(Mr. Rosenthal) I handed that to Mr. Morgan this morning, Your Honor, and he was about to go over them with Mr. McCray when court started in session.

(Mr. Morgan) We have them right here, Your Honor, we'll go over them as quickly as possible and get them into evidence.

(448) You may step down, Mr. McCray.

(The Court) Well, do you want him to make any explanations of these charges?

(Mr. Morgan) Well, Your Honor, perhaps the easiest way to do it would be for me to go over them with him and then we can stipulate to what is agreed to. If there's any disagreement, perhaps he could testify to it.

I think we're going to be able to stipulate to the prior convictions.

(The Court) All right, how long — well, do it now.

(Mr. Morgan) All right.

(Conference between attorney and his client.)

(The Court) Well, we will take a 15-minute recess while you do that.

(At the conclusion of a short recess, the following proceedings were had:)

(The Court) All right.

(Mr. Rosenthal) If Your Honor please, counsel for both sides have stipulated to the record of McCray where he was, in fact, represented by counsel.

In chronological order, beginning with the first, Mr. McCray was found guilty of burglary on January 7, 1960, Baltimore, Maryland, received a sentence of four years.

On November 27, 1963, Mr. McCray was charged with two counts of burglary in Baltimore, Maryland, received an (449) 18-month sentence as to each to run consecutively.

(The Court) Two counts?

(Mr. Rosenthal) Of burglary.

(The Court) Yes.

(Mr. Rosenthal) Was found guilty on both counts, received 18 months for each to run consecutively, making a total sentence of three years.

On October 21, 1969, Mr. McCray received a total sentence of 28 years, Your Honor, which he is presently serving, for the following charges:

One, assault with intent to murder;

Two, receiving stolen goods;

Three, uttering;

Four, deadly weapon charge;

And another assault with intent to murder.

(The Court) All right.

(Mr. Rosenthal) The record before the Court, Your Honor, the Defendant would request that Mr. McCray return to the stand for just one question.

(The Court) All right.

(Mr. Rosenthal) Mr. McCray.

(450) MILTON McCRAY,

the Plaintiff, resumed the witness stand, and, having been previously duly sworn, testified further, as follows:

RECROSS EXAMINATION (Resumed)

By Mr. Rosenthal:

Q. Mr. McCray, I believe that when you just testified, you stated that at the hearing of the adjustment team for the violation of being, or missing count, or not being at work— A. Yes.

Q. —that you were found not guilty? A. Yes, it was something similar to that, I think it was.

I know my — I was taken off the south wing right after that, I don't know—

Q. Let me try to refresh your memory, Mr. McCray, I'm reading from your base file, the hearing took place on January 5th, 1972 and the Board's conclusion, after you plead not guilty and stated I'm not guilty, found you guilty of failure to report to his work assignment for count, and recommends a reprimand. A. Yes. Well, that's right.

Q. This was a split decision, two to one, but you do recall having been found guilty of that infraction? (451) A. Yes.

Well, when I said, found not guilty, I was referring to the reprimand, I consider that as a release.

(Mr. Rosenthal) I have no further questions of the witness, Your Honor.

(The Court) All right.

(The Clerk) That's all.

(The Court) All right.

(Mr. Morgan) Your Honor, the only other evidence on behalf of the Plaintiff would be Dr. Gould's testimony and he will be here at 2:00 o'clock.

(The Court) Yes, sir.

(Mr. Morgan) As I understand it.

(Mr. Rosenthal) We will call Mr. Burrell to the stand.

ROBERT BURRELL,

the Defendant, was called as a witness for and on behalf of the Defendant, and, having been first duly sworn, testified as follows:

(The Clerk) State your name.

(The Witness) Robert Burrell.

(The Clerk) Thank you.

(452) DIRECT EXAMINATION

By Mr. Rosenthal:

Q. Now, what is your present occupation, Mr. Burrell? A. I am Hearing Officer for the Division of Correction.

Q. And how long have you had that position? A. I was appointed in March of last year.

Q. 1972? A. Yes.

Q. And previously to that, what was your occupation? A. I was a Correctional Officer for the Maryland Penitentiary.

Q. And how long had you held that position? A. I was appointed in 1951, August 21st.

Q. And at the time — excuse me — in December of 1971 and January of 1972, what was your position at the Maryland Penitentiary? A. I was Duty Captain of the day shift, 8:00 to 4:00.

Q. And what exactly does this entail? A. This position is responsible for the daily operation of the institution under the supervision of the Major, Deputy Warden, Warden.

I have all officer assignments, all routine matters would be coming to me for disposition or to be referred to the proper people for disposition.

Q. Now, when you say, Mr. Burrell, all routine matters, (453) are you talking about for a particular section of the Penitentiary? A. The entire institution.

Q. And this was the position that you held on December 30th, 1971, is that correct? A. That's correct.

Q. Now, are you familiar with Mr. McCray, the Plaintiff in this case? A. Yes, sir.

Q. And are you familiar with the incident which took place on January 1st, 1972, with reference to Mr. McCray? A. I refreshed my memory from my reports prior to that time and—

Q. Do you have a copy of your reports with you? A. Yes, sir.

Q. All right.

Now, when, if you can recall, was the first time that you had any knowledge of the fire in the cell of Mr. McCray? A. Approximately 9:20.

Q. Is that a.m. or p.m.? A. a.m.

Q. On January 1st, 1972? A. That is correct.

Q. What report, if any, did you receive? A. I don't remember receiving the report, as such. (454) Based on my report, I received a report which was probably verbal, either by phone or perhaps radio.

Q. Well, what did you receive? A. I was informed by Sgt. Witte that Inmate McCray had set his cell on fire.

Q. And what, if anything, did you direct — was it Officer Witte? A. Sgt. Witte, W-i-t-t-e.

Q. Yes.

What did you direct him to do, if anything? A. I told Sgt. Witte that the man was to be taken to the hospital and seen by the nurse on duty and then he was to be placed in the mental observation unit.

Q. Now, to your knowledge, was this done? A. Yes, sir.

Q. And did you see the Plaintiff, Mr. McCray, at any time? A. Yes, sir.

Q. And when was that? A. I do not remember the exact date that it took place, it took place in the hospital at some time, the time area I do not know just exactly when it was.

Q. Was he being treated at that time? A. I don't remember, sir.

Q. Can you recall his physical condition with reference (455) to the possibility of being burned? A. No, sir.

Q. Did you notice anything unusual about him? A. Not to my recollection.

Q. All right.

Now, Mr. Burrell, after Mr. McCray was seen at the dispensary or hospital, what, if anything, else took place? A. Mr. McCray was placed in the mental observation unit.

Q. And this is where in relation to the general Penitentiary? A. It's on the fourth floor of the hospital on the west end.

Q. And the hospital is on what floor? A. Sir?

Q. The hospital is on what floor? A. Well, the hospital has four floors, the dispensary where he was treated was on the first floor.

Q. And what, if anything, thereafter did you do, was there anything else that you did? A. I can't remember specifically doing anything particularly after him being checked by the nurse on duty and having placed in the mental observation unit.

Q. And he was placed in the mental observation unit as a result of you request, is that correct, sir? (456) A. My order, sir, not my request.

Q. Your order.

Now, why was he placed in the mental observation unit? A. In my opinion, had he been returned to the south wing, he would have continued to create another disturbance, which I wished to prevent due to the fact that this was a weekend and I would want to prevent it in any event, however, on the weekend where we are

working with a short staff, it would be detrimental to the security and control of the institution if I allowed him to go back there and create another disturbance, which I thought perhaps could be done.

Q. Now, was he stripped at the time he was placed in the mental observation cell? A. Yes, sir.

Q. And what was the reason for this? A. The reason for this, in my opinion, I felt that this setting of this cell on fire was not a rational act and I was responsible for his well being as well as everything else in that Penitentiary, therefore, I ordered it.

Q. So, in your opinion, this was a precautionary measure? A. Yes, sir.

Q. Did you at any time refuse him any medical services? (457) A. No, sir.

Q. Did you at any time place him in a mental observation unit for punishment? A. No, sir.

Q. Now, Mr. Burrell—

(Mr. Rosenthal) Excuse me one second, Your Honor. We have copies of records, but I think maybe these are originals.

By Mr. Rosenthal:

Q. Well, Mr. Burrell, I show you photostatic copies of pages that are numbered 51, 52 and 53.

While counsel is looking at those, can you tell me where those records were obtained? A. Those are copies of the log book that's kept by the fourth floor officer.

Q. Fourth floor of what? A. Of the hospital, sir.

Q. Which is the mental observation unit? A. That includes the mental observation unit, and the tubercular ward, I think, and right now I believe they're using it as a psychological ward, also, they have the Psychological Department located up there now.

Q. Now, Mr. Burrell, in whose handwriting is this kept? A. The officer's handwriting, sir.

(458) Q. And is this record kept in the ordinary course of business of the Penitentiary? A. Yes, sir.

Q. And is it retained by the Penitentiary as a business record made in the ordinary course of business? A. Supposedly.

(Mr. Rosenthal) Your Honor please, there are approximately five written marks in red ink on these papers, which are Mr. Burrell and my markings, which are just check marks and numbers which were not made in the ordinary course of business, but other than that, we would move that these records be introduced into evidence as the Defendant's exhibits, either 1A, B and C, or whatever numbers.

(The Court) Well, you've got one exhibit in now, haven't you?

(Mr. Rosenthal) I'm sorry, I guess it would be 2, Your Honor, A, B and C.

(Mr. Morgan) Your Honor, the Plaintiff objects to the introduction of these exhibits on the grounds that these exhibits are part of the mental observation log book which we requested on motion for production of documents and which was ordered to be produced by this Court two weeks ago.

We also served a subpoena on Mr. Walters of the Penitentiary and requested that he bring the log book from (459) mental observation here on Monday at 10:00 o'clock. Other documents were brought, these documents were not brought. This is the first time we've seen these documents and we would object to them on those grounds.

(The Court) Counsellor, why weren't these documents produced in accordance with the order?

(Mr. Rosenthal) If Your Honor please, I have no idea. I was under the impression that they had. I tried to work, and Mr. Morgan will verify this, very closely with Mr. Morgan and with Mr. Frenkil in our office who represents the institution to make sure that Mr. Morgan received every exhibit that he so subpoenaed.

We have given, as a matter of fact, Mr. Morgan every file that we have here today, and I was under the impression that he had seen these, but that they did not leave the Penitentiary, as such.

(The Court) Well, I'll permit them in, but I want — when I have ordered documents produced, I want them produced.

(Mr. Rosenthal) We will get copies for Mr. Morgan and I do point out to the Court for the record that these are dated, the two days, the six shifts that Mr. McCray testified that he was in the mental observation unit.

(The Court) All right.

(Mr. Morgan) Your Honor, if these documents are to (460) be introduced, I think that all the documents from the log of mental observation concerning the days Mr. McCray was in that unit should also be produced.

It was Mr. McCray's testimony that he recalled being in the unit approximately two days. I think the log book will show that he was there three, possibly four days, and I think all those records should be introduced at this point.

(Mr. Rosenthal) These records, Your Honor, show the time and date that Mr. McCray was admitted to the mental observation on January 1st, the time and date that he was released to go back to the south wing.

(The Court) Those are all the documents relating to McCray at that particular time?

(Mr. Rosenthal) That is correct, Your Honor.

(The Court) Well, if there are any other documents that Mr. Morgan wishes to see, he may do so.

(Mr. Rosenthal) Yes, he may see them, Your Honor, sure, we have no objection, and as stated, and I think Mr. Morgan will back this up, that we tried to cooperate 100 per cent.

(The Court) All right.

(Mr. Rosenthal) I apologize to Mr. Morgan and I know of no reason why he had not seen these.

(The Court) All right.

(461) 2A is Page 51, 2B is 52, and C is 53.

Okay?

(The Clerk) Yes, sir.

So marked, Defendant's 2A, B and C.

(Documents were marked Defendant's Exhibits Numbers 2A, B and C.)

(Mr. Morgan) Your Honor, since there are no copies in court today, would we be able to use the actual exhibits for cross-examination, we've never had an opportunity even to read them?

(The Court) Sure.

(Mr. Morgan) Thank you.

(Mr. Rosenthal) I had not seen them before this morning, either, Your Honor, that's why there are no copies available.

(Mr. Morgan) Thank you.

(The Court) Well, wait a minute, you can use them on cross.

(Mr. Rosenthal) All right.

By Mr. Rosenthal:

Q. Now, Mr. Burrell, you have heard the colloquy that just took place with reference to these records.

Are these, in fact, the records about which you were speaking? A. Yes, sir.

(462) Q. And would you please read on Page 51 the time and date that Mr. McCray was admitted to the mental observation unit? A. January 1, 1972, 9:45, Inmate Milton McCray was admitted to the MO unit from segregation, making count eight.

Q. And would you read, if you will, the time and date that Mr. McCray was released? A. January 3rd, 1971.

(The Court) '71 or '72?

(Mr. Rosenthal) It should be '72, Your Honor, but the paper does, in fact, state '71.

(The Witness) It states '71, sir.

The officer evidently made a mistake. The entry above it on the 12:00 to 8:00 shift says 1/3/72. This is the 8:00 a.m., 0800. Made security round of MO, mental observation unit and found it safe and secure. Count eight. Unit—

(Mr. Morgan) Excuse me, Mr. Burrell, what day is this you're reading?

(The Witness) 3 January.

Cleaned up at this time. Milton McCray 110563 discharged to south wing escorted by A. Johnson. Count is now seven. All patients were fed in unit at this time.

(463) By Mr. Rosenthal:

Q. All right.

Now, Mr. Burrell, I show you Page 52, which is Exhibit 2B, and ask you if you will read from January 2nd, 1972, the entry at 0800 and the entry at 10:45, both being a.m., and the entry at 3:30 p.m.? A. The first entry, 0800, Milton McCray received medication as prescribed. Water was given out in MO unit.

10:45, regular diet cart to MO.

(The Court) What?

(The Witness) Regular diet cart to MO. All inmates were fed.

3:30, made final check of MO and men in unit and found everything to be in a satisfactory and secure being. Count in MO unit, eight.

Signed by R. P. Stanton, COII.

(The Court) And he was released at 8:00 a.m. on January 3rd?

(Mr. Rosenthal) That's correct, Your Honor.

(The Court) All right.

By Mr. Rosenthal:

Q. Now, Mr. Burrell, in your capacity as the Duty Captain, 8:00 to 4:00 shift, did you receive any reports from officers pertaining to this incident? A. Yes, sir.

(464) Q. And did you receive a report from Sgt. Martin dated January 1, 1972? A. Yes, sir.

Q. And do you recall Sgt. Martin's position with the institution at that time? A. Sgt. Martin was assigned to the hospital in the dispensary as a Medical Officer.

Q. Now, Mr. Burrell, I show you a copy of the report and ask you if you can identify that, sir? A. This is a copy of Sgt. Martin's report to me as Shift Commander.

(Mr. Rosenthal) And we would move, Your Honor, counsel does have copies of all these records, that this be introduced as Defendant's Exhibit Number 3.

(The Court) What is it?

(Mr. Rosenthal) A report relating to the fire, Your Honor, and the treatment of Mr. McCray at the dispensary by Sgt. Martin.

(The Court) All right.

(Mr. Morgan) We have no objection to this, Your Honor.

(The Clerk) Marked as Defendant's Exhibit Number 3.

(Document was marked Defendant's Exhibit Number 3.)

(The Court) Okay.

(465) By Mr. Rosenthal:

Q. Now, again, with relation to this incident, Capt. Burrell, I show you a report from Sgt. Witte, to whom I think you made reference in your testimony, can you identify that, sir? A. This is the formal report of this incident to me from Sgt. Witte.

(Mr. Rosenthal) We would ask that this be introduced into evidence, Your Honor, as Defendant's Exhibit Number 4.

(Mr. Morgan) This particular report, Your Honor, we would have an objection to on the grounds that there has been no basis laid here for this being a business record kept in the ordinary course of the operation of the Penitentiary.

It appears to me to be a — well, as a matter of fact, it's not even to Capt. Burrell, it's to the Warden from Sgt. Witte, it appears to me to be a letter and nothing indicating that this is a record ordinarily kept.

(The Court) Lay the foundation, Counsellor.

(Mr. Rosenthal) Your Honor please, we would — the report itself is within the base file of Mr. McCray, as are all these exhibits, Your Honor, but let me go into the foundation.

(466) By Mr. Rosenthal:

Q. Captain — Mr. Burrell, in your position as Captain, Duty Captain, 8:00 to 4:00 shift, was it your duty to receive these reports from officers? A. It was my duty to see that they were made and that everything, all information was relayed to the Warden. Each officer would be required on any incident to make a report and I would file a cover report, and especially in the area of weekends and holidays, that would be on his desk when he came to work, unless it would be of such importance that I would have to inform him at home.

Q. Now, was it the obligation and duty of the officers to make these reports of any incidents in the Penitentiary in the normal course of their business as officers of the Penitentiary? A. Yes, sir, it is their duty to do so.

Q. And were these records or reports so made? A. Yes, sir.

(The Court) And were kept in the ordinary course of business?

(The Witness) I beg pardon, sir?

(The Court) And were they kept in the ordinary course of business?

(The Witness) When I operated the shift, everything was documented.

(467) (The Court) All right.

Objection overruled.

(Mr. Morgan) Your Honor, if I may cite the Court to a legal authority on the objection that I made.

Particularly the case of Bracey versus Herringa, and I don't have the F.2d cite on it, but it's a Seventh Circuit case, decided August 3rd, 1972, the Court there said, the policy permitting the admission into evidence of records

made in the regular course of business is based on the trustworthiness and reliability of that kind of records.

Then further in the next paragraph states, we conclude that it was error for the District Court to accept in support of the Defendants — the Defendants in this case who were prison Correctional Officers — the motion for summary judgment, prison records which included the self-serving statements of the Defendants themselves, as well as statements of other prison guards who were subject to possible Civil Rights Acts liability. This kind of record lacks reliability and trustworthiness.

We would say that this is a sound statement of the law with regard to this, Your Honor.

(The Court) Well, if it is, it's one of the few sound decisions coming out of the Seventh Circuit, I don't consider myself bound by it, and the objection is overruled.

(Mr. Morgan) All right, sir.

(468) (The Clerk) Marked as Defendant's Exhibit Number 4.

(Document was marked Defendant's Exhibit Number 4.)

(The Court) All right.

By Mr. Rosenthal:

Q. Now, Capt. Burrell, again, in the ordinary course of business at the Penitentiary, I show you a report from Corporal Alston and ask if you can identify that? A. This is a report from Mr. Alston, who was the Segregation Medical Officer, dated January 1, it's to the adjustment team and it's headed, information and evaluation.

Q. Now, was that kept in the normal course of business? A. Yes, sir.

Q. And was it Corporal, or Mr. Alston's duty as Segregation Medical Officer to supply this type of a report? A. Yes, sir.

Q. And was it your duty in the normal course of business of the institution to receive such a report? A. Yes, sir.

(Mr. Rosenthal) If Your Honor please, we would introduce this as Defendant's Exhibit Number 5.

(Mr. Morgan) Your Honor, the Plaintiff objects again on the same grounds as before and, in addition, on this particular exhibit, the heading at the top states, The Maryland (469) Penitentiary, directly under that it states, Special Report, January 1st, 1971.

It seems absolutely clear to me that this is not a record kept in the normal course of business, it's a special report, in fact, and, therefore, should be excluded.

By Mr. Rosenthal:

Q. Captain Burrell, if I may, on this point, can you define a special report? A. Well—

Q. That is kept in the ordinary course of business at the institution? A. I think that this was out of the ordinary, things of this nature being sent to the Warden generally are headed, special reports.

Q. And is that the reason why that was so— A. I would imagine so.

Q. —titled?

(The Court) Objection overruled.

(The Clerk) Marked Defendant's Exhibit Number 5.

(Document was marked Defendant's Exhibit Number 5.)

(The Court) All right.

By Mr. Rosenthal:

Q. The last exhibit I have, Captain Burrell, and ask if you would just identify this paper? (470) A. This is a report from Major F. R. Clingenpeel, Shift Commander, 4:00 to 12:00 shift, to me as Duty Captain on the 8:00 to 4:00 shift, dated January 4, 1972.

Q. And was this record kept in the ordinary course of business? A. I would believe it's necessary that the Shift Commanders and the Duty Captains have knowledge of what happens prior and before each shift.

Q. And was this a memo to you, or directive? A. It was a memo to me for my information.

Q. With reference to what? A. With reference to Inmate Milton McCray, receiving treatment.

Q. That's all.

In this particular instance — and this is dated January 4, 1972? A. Yes, sir.

(Mr. Rosenthal) Your Honor please, we would ask that this be introduced as, I think it's Defendant's Exhibit Number 6.

(The Clerk) Marked Defendant's Exhibit Number 6 in evidence.

(Document was marked Defendant's Exhibit Number 6.)

(471) By Mr. Rosenthal:

Q. Now, Mr. Burrell, you heard Mr. McCray testify with reference to his failure to report to the library or to work on January 31st, 1971, is that correct, sir? A. Yes, sir.

Q. Is there an inmate rule book which is given out to the inmates? A. Yes, sir.

Q. And I show you a book here with a blue cover and ask if you can identify this book? A. That is the current rule book for inmates at the Penitentiary. In addition to that, we have the yellow book that is overall from the Division Headquarters.

Q. Division of Correction? A. Yes, sir.

Q. For all the institutions? A. Yes, sir.

Q. But this pertains specifically to the Maryland Penitentiary? A. Yes.

Q. Now, I call your attention to Pages 12, 13 and 14 of this book relating to violations which are subject to hearing before the adjustment team, and ask you if you can identify Item Number 16? A. Item 16, delaying security count.

(472) Q. What does that mean, Mr. Burrell? A. It means that this is an infraction of the rules of the Maryland Penitentiary.

Q. And what encompasses the delaying of the security count?

(Mr. Morgan) I object to this line of questioning, Your Honor, unless Mr. Burrell is willing to state that this rule book was a rule book that was in effect at the time we're talking about, December 30, 1971.

My understanding from the testimony yesterday is, regarding the same rule book, it came into effect last summer, in August of 1972.

By Mr. Rosenthal:

Q. Mr. Burrell, do you know whether, in fact, that this was or was not in effect— A. I don't believe that particular book was in effect, sir.

Q. It was not.

Do you recall of your own knowledge, of your own personal knowledge, whether or not it was a violation of the rules in the Maryland Penitentiary in December, 1971, for someone to miss a security count? A. It certainly was.

Q. And what does the missing of a security count encompass? (473) A. Well, missing of a security count means, number one, that the inmate is not at his assigned place.

Now, it is taken at that time by the Shift Commander, or whoever gets the information, and you then must search the institution until you find this inmate, and you assume, of course, the possibility of escape, the possibility that he has been hurt, that he is sick, anything that could possibly keep him from being where he's supposed to be at that time.

Q. All right, and Mr. McCray at that time was in the general population, is that correct? A. Yes, sir.

Q. And if, in fact, he was not to work on that date, he still would be subject to the security count? A. Yes, sir.

Q. And I believe there has been testimony in these cases that the Maryland Penitentiary is the maximum security institution for the State of Maryland? A. That is correct.

(Mr. Rosenthal) Your Honor please, we would have no other questions, and Mr. Morgan's witness.

CROSS EXAMINATION

By Mr. Morgan:

Q. Mr. Burrell, it was your order that placed the Plaintiff, Milton McCray, into the mental observation unit, (474) isn't it? A. That is true.

Q. Mr. Burrell, if I may direct your attention to several of the exhibits that were introduced during the direct examination.

Specifically, the memorandum to you from Sgt. H. L. Martin, listed as Dispensary Officer, do you know Sgt. Martin? A. I beg pardon?

Q. Did you know Sgt. Martin at the time? A. Yes, sir.

Q. Do you know what qualifications, if any, Sgt. Martin has to be a Dispensary Officer? A. Well, Sgt. Martin has for quite some time been a Red Cross instructor in first aid, he is used not only by the Penitentiary and the Division, but also, I believe, he has outside interests in this area, and, if I'm not mistaken, he also was requested to teach first aid at the City Jail.

Q. All right, sir.

The report states, sir:

At about 9:40 a.m., this date, Inmate McCray, Number 110563, was escorted to the dispensary for treatment. Inmate McCray stated that his cell had caught on fire and that he had swallowed smoke. He further stated he was having (475) difficulty in breathing. This officer could not detect any difficulty in his breathing. His respiration was normal (20), pulse slightly rapid but well within normal range. Speech was good, that is, no slurring of speech, rather a loud

demanding tone of voice. He further stated he burned his neck and right hand. No blisters detected. Patient was treated with cold compresses to areas of neck and hand where he stated he was burned. His eyes, nose and ears irritated as a preventive measure and eye-mo applied to eyes to safeguard against irritation.

Respectfully submitted, Sgt. Martin.

This memorandum refers to the medication that McCray received at 9:40 a.m. on January 1st, doesn't it? A. It refers to the treatment he received at that time.

Q. Fine.

There is also a report here directed to the Warden, which you received a copy of, from Sgt. Witte.

What was Sgt. Witte's position at that time? A. Sgt. Witte was the officer in charge of the south wing segregation unit.

Q. It was Sgt. Witte's duty to make sure that south wing operated correctly, wasn't it? A. Yes, sir.

Q. If an inmate were to be injured in his cell, that (476) would be Sgt. Witte's responsibility, wouldn't it — I'll withdraw that question.

Wouldn't Sgt. Witte be responsible to the Warden for explaining why an inmate was injured in his cell, if that occurred during Sgt. Witte's shift? A. He would also be responsible to me, primarily, in that I was the only one there at that time on the weekend, there was no Warden, no Deputy, no Major, which is a common occurrence.

Q. Sgt. Witte would have to explain to you what happened, and why? A. Yes, certainly, he would have to explain to me.

Q. Now, Mr. Burrell, you are familiar with the mental observation unit, is that correct? A. Yes, sir.

Q. On January 1st, 1972, and I'm directing your attention now to Page 51 of this copy from the log books, signed by Sgt. Stanton, 0800, relieved Officer Lazoskie and checked MO and found all to be in order, all inmates alive and well. Count in MO, seven patients.

Has it ever been your experience, Mr. Burrell, that an inmate has died in MO? A. Yes, sir.

Q. Do you recall when that was? A. I don't—

(477) (Mr. Rosenthal) I object, Your Honor, unless there's some relevancy.

(The Court) Objection overruled.

Go on.

(The Witness) I don't remember the date.

By Mr. Morgan:

Q. Do you recall the circumstances? A. Yes, sir.

Q. Mr. Burrell, you testified on direct examination that as Duty Captain, I believe, for the day shift, is that the proper title? A. That's correct.

Q. You were responsible for the operation of the entire institution, is that correct? A. The control and security of the institution.

Q. Were you also responsible for the hospital area? A. As far as control and security of it, yes, sir, not for the medical operation.

Q. Were there any regulations, written regulations, in the Penitentiary on January 1st of 1972 governing the use of mental observation cells? A. I think so, sir.

Q. I show you this directive, Directive Number 1270, from the Commissioner of Correction, Deputy Commissioner of Correction, is that the directive that was in effect at that (478) time? A. I believe it's dated August 10th, 1970, I do not know, effective 8/10/70, it would be in effect.

(Mr. Morgan) All right, sir.

We would introduce this as a Plaintiff's exhibit.

(The Clerk) Marked as Plaintiff's Exhibit Number 3.

(Document was marked Plaintiff's Exhibit Number 3.)

By Mr. Morgan:

Q. Now, Mr. Burrell, I refer your attention to the very last sentence of this directive. A. Just a moment, sir, I don't have a copy.

Q. Oh, well, I was going to read it to you.

(Handed.)

The last paragraph, in fact:

In the absence of the psychologist or psychiatrist, an inmate who is displaying mentally disturbed behavior may be placed in an isolation cell for the inmate's own safety, or that of the inmate population, until the psychologist/psychiatrist is notified. The psychologist/psychiatrist should be contacted immediately after the confinement of the inmate, and the inmate should be evaluated within a twenty-four hour period.

My question, Mr. Burrell, in this particular case, was the psychologist or psychiatrist notified within twenty-(479) four hours of the time that Mr. McCray was placed in the mental observation? A. I cannot answer that, I do not know, I don't remember.

Q. You didn't notify a psychologist or psychiatrist yourself, did you? A. I don't remember, sir.

Q. There's nothing in your records that indicate you did, is there? A. The few records that I could find.

Although it does say in my report that, in my opinion, inmate is not psychotic and that I placed him there for his own protection.

Q. Didn't you testify on direct, Mr. Burrell, you placed him there for the control of the institution because you felt that to place him over the weekend would cause a security problem? A. Well, then, also, it's for his own protection, maybe I forgot to mention it, I don't know.

Q. Well, the directive specifically says:

An inmate may be placed, et cetera, in isolation cell, for his own safety or that of the inmate population.

And that's what happened in this case, isn't it? A. If I put him back in the south wing and he burned up another cell, where would I be, now is that his own (480) protection, or not?

Q. It clearly is.

Thank you.

Now, Mr. Burrell, you testified you saw the Plaintiff in the hospital, in the dispensary area, I believe? A. I saw him down there somewhere, I can't remember where.

Q. Was that the morning of the fire? A. It was sometime in that general time area, I don't know.

Q. Was that — it was that same day, wasn't it? A. Certainly.

Q. You testified on direct examination, Mr. Burrell, that starting a cell fire is not a rational act and that you were responsible for the Plaintiff's safety and, therefore, you placed him in the mental observation.

Did you have an opportunity to view this cell after this incident? A. Yes, sir, but I don't remember exactly the time.

Q. Did you have an opportunity to talk to any of the inmates who were in the cells next to the cell that burned? A. I don't remember talking to either one, or if there were anybody in those cells.

Q. Do you recall talking to any officers about this? (481) A. I can't recall if I talked to any specific officer about it, I know without doubt that I did, but who he was or what was said, I can't remember.

Q. Do you recall conducting any kind of an investigation to determine the cause of this fire? A. What do you mean, I'm sorry?

Q. Do you recall conducting any kind of an investigation to determine the cause of the fire? A. Other than my interview with McCray, I can't remember anything.

Q. When was your interview with Mr. McCray, Mr. Burrell? A. It was the day of the fire, sometime that morning, I would assume, but I can't even definitely state that.

Q. Do you recall where that interview took place? A. In the hospital.

Q. What did you — well, during that interview with Mr. McCray, did you explain to him that you were going to put him in the mental observation? A. I don't remember.

Q. Do you recall the substance of your conversation with McCray? A. The best that I can give you, Mr. Morgan, is what I have in my report.

Q. Mr. Burrell, during this period of time, when a (482) situation arose where it occurred to you that possibly an inmate was eligible to be put in mental observation, were there any written standards that guided you in making that kind of a determination? A. I don't remember whether there was, or not. If there wasn't, there should have been.

Q. During this period of time, Mr. Burrell, did you have an opportunity to put any other inmates into mental observation? A. I'll have to check the record.

Q. Well— A. As far as I know—

Q. Do you recall ever having ordered another inmate to mental observation? A. I don't recall the specific incident, but I imagine it has been done.

Q. Well, Mr. McCray is not the only inmate you've ever placed in mental observation, is he? A. No, sir, I wouldn't say he was, but I wouldn't say that I have direct knowledge at this time if I placed so-and-so in mental observation for any particular reason.

Q. But you can recall having placed unidentified inmates at this time in mental observation? A. I suppose I have at one time or another placed some inmate in every part of that institution, for some reason.

(483) Q. Was it your practice when you placed inmates into mental observation to order that their clothing be removed? A. If I felt it was necessary, yes, sir.

Q. Now, was it your practice to instruct the hospital to remove the mattress from the mental observation? A. I would not allow anything in that — if this man, in my opinion, needed to have his clothes removed from him, then he needed to have the mattress, or whatever else might be in there, removed also.

Q. Now, in this particular case, do you recall at any time between the morning of January 1st and the morning of January 3rd checking back with the hospital to

obtain information about Mr. McCray's physical condition? A. Specifically, no.

I just cannot remember, but it is my practice, and it is still the practice, that the supervisory officers on the shift will visit every area of the institution during their shift.

I don't know whether I went to MO, whether the Lieutenant went up there, whether we both went, or perhaps the two Lieutenants and I, I just can't say.

Q. During the time Mr. McCray was in mental observation, he was still in the Penitentiary, wasn't he? A. Absolutely.

Q. And having been put there by you, he was your (484) responsibility, wasn't he? A. Everybody inside those walls is my responsibility.

Q. Did you issue the order that removed Mr. McCray from mental observation? A. I don't remember.

Q. Mr. Burrell, have you ever seen a cell fire at the Maryland Penitentiary, other than this one that has been described? A. Yes, sir.

Q. In terms of intensity and seriousness, how would you rate this particular fire with the— A. To be right frank with you, Mr. Morgan, it scared the hell out of me.

Q. Was it about the worst one you've ever seen? A. It's a wonder that the entire block was not burned, if it hadn't been for the quick action by the officers, we possibly would have lost quite a few inmates there.

Q. Mr. Burrell, I show you a series of six photographs, can you identify each one of these photographs, please? A. These are photographs that were given to me at my request by Lt. Donald Shields, and I don't know if he is with the Penitentiary or with the Reception Center at the present time. But he is the officer in charge of the Identification Department, and his photographer, or he, I (485) don't know which, took these photographs.

Q. What are they photographs of? A. These are photographs of the cell that was burned.

(Mr. Morgan) Do you have any objection to these, Mr. Rosenthal?

(Mr. Rosenthal) None.

(Mr. Morgan) Your Honor, we would offer these as Plaintiff's next exhibits, and perhaps Mr. Burrell could describe each one in order as we introduce them.

By Mr. Morgan:

Q. First, Mr. Burrell, what is this photograph? A. This photograph was evidently taken from the front of the cell, it shows the bed on the left, what looks to be a blanket hanging over the corner of the bed, a wall locker that is leaning against a broken toilet, and on the lefthand side a broken sink partially remaining on the wall.

Q. All right, do the walls appear to be charred there, or is that the normal condition of those walls? A. They're smoked up very bad.

Q. Okay.

How about the next one?

(The Clerk) Can I mark them as you give them?

That will be Plaintiff's 4A. These will all be in evidence.

(Photograph was marked Plaintiff's (486) Exhibit Number 4A.)

(The Witness) This is a photograph evidently taken by the photographer standing on the end of the bed looking down in the corner where the broken sink partially remains on the wall.

By Mr. Morgan:

Q. And, again, the walls are in that condition because of the smoke, apparently? A. Well, that is not the regular condition of those walls.

Q. I see.

You saw the cell after the fire, didn't you? A. Yes, sir.

Q. Was it your opinion in viewing the appearance of the cell that these marks were caused by smoke? A. I

don't know what caused it, smoke, flame, or what it was.

Q. Caused by fire, though? A. In my opinion, yes, sir.

(Mr. Morgan) All right.

(The Clerk) Plaintiff's 4B.

(Photograph was marked Plaintiff's Exhibit Number 4B.)

By Mr. Morgan:

Q. What does the next one show? (487) A. This is a shot of the tier from, evidently, in front of 323, looking down the tier, and it shows the cell door open, it's smoked at the top and bottom, and some evidence of smoke on the top or the bottom of the fourth tier, which would be under the sides, or something.

(Mr. Morgan) All right, sir.

(The Clerk) Plaintiff's 4C.

(Photograph was marked Plaintiff's Exhibit Number 4C.)

(The Witness) This is apparently a picture taken from the opposite direction on the tier.

(Mr. Morgan) All right, sir.

By Mr. Morgan:

Q. What is the next one?

(The Clerk) Plaintiff's 4D.

(Photograph was marked Plaintiff's Exhibit Number 4D.)

(The Witness) A picture of the bed and corner of the cell.

By Mr. Morgan:

Q. Are those markings there from your recollection, having seen this first-hand, signs of the fire damage, as well? A. Yes, sir.

(The Clerk) Plaintiff's 4E.

(488) (Photograph was marked Plaintiff's Exhibit Number 4E.)

By Mr. Morgan:

Q. And this would be the final one of this series of pictures, what does that show? A. This is a picture taken from the back of the cell looking out the cell door, at the bottom, the third of the cell door, quite a bit of debris piled in front of the door.

Q. Where is the bed in this picture, Mr. Burrell? A. The bed would be on this side, evidently has been — back against the wall, out of the way for the picture.

Q. Which is why it doesn't show in this picture? A. I would imagine so.

Q. And, again, the markings on the wall and the floor are caused by the fire, fire damage? A. I don't know about on the front, but, evidently, it's burned on both sides of the door.

Q. On the wall? A. Yes, sir.

(Mr. Morgan) All right, sir.

(The Clerk) Plaintiff's 4F.

(Photograph was marked Plaintiff's Exhibit Number 4F.)

(489) By Mr. Morgan:

Q. Mr. Burrell, were you familiar with the material that the mattress in Mr. McCray's cell was made of? A. No, sir, I'm not.

Q. You're not familiar with that material? A. No, I'm not.

In that particular unit, mattresses are destroyed quite regularly and I do not — it could have been one of two types of mattresses, they have a foam rubber mattress, I believe it is, and also the older mattresses are — I don't know what's in them, cotton, or something.

Q. Well, perhaps by looking at this photograph again, I can refresh your memory of what was in Mr. McCray's cell.

(Mr. Rosenthal) Your Honor please, unless the witness can identify the material from the picture, I think he has already testified he didn't know which kind—

(Mr. Morgan) That's what I'm going to ask him, if he can't.

By Mr. Morgan:

Q. Does that appear to be a foam rubber kind or a cloth kind? A. If this is the mattress on top, it appears to be the foam rubber.

Now, I do not know that that — that this particular mattress was — also something underneath of the pile that has (490) striping on it similar to what the other mattresses are.

Q. I see.

All right, sir.

This particular situation, Mr. Burrell, you had personal knowledge that Mr. McCray had suffered injury as a result of this fire, didn't you? A. Sir?

Q. When you saw Mr. McCray in the hospital on January the 1st, at that time you gained personal knowledge that Mr. McCray had suffered injury as a result of this fire, didn't you? A. According to my reports, he was not burned, there was no evidence of it. Sgt. Martin's report states—

Q. Well, doesn't Sgt. Martin's report also show that he received — I'm not sure that that's what it states. A. Well, sir, you have that, please read it.

Q. All right, sir.

The last two sentences state:

Patient was treated with cold compresses to areas of neck and hand where he stated he was burned. His eyes, nose and ears irritated as a preventive measure and eye-mo applied to eyes to safeguard against irritation.

Is it your recollection that Mr. McCray had suffered some injury as a result of this fire? A. No, sir.

(491) Q. Mr. Burrell, I believe your prior testimony was that you don't recall anything about this incident except what's in the reports, is that right? A. Frankly, I had forgotten about it completely until this matter came up.

Q. Of your own personal knowledge, Mr. Burrell, did Mr. McCray see a doctor during the two days he was in MO? A. I don't know.

Q. Again, to your personal knowledge, did Mr. McCray have an interview or see a psychologist while he was there? A. I don't know.

I will remind you that that was the 1st and 2nd of January, it was a weekend.

Q. Mr. Burrell, to save time, rather than ask you a direct question concerning the condition of MO, you heard Mr. McCray testify about what the cell looked like, the construction, the color, the hole in the floor, is that substantially the way— A. It's a bare cell. The mattresses are available. There is what is known as an oriental toilet in the floor, it flushes automatically on a time sequence, I think every three to five minutes, or so. The cell windows on that particular side of the institution were covered with sheet metal of some sort due to some incident that took place, I've forgotten now what it was, that the security screens were not (492) sufficient to secure the window, therefore, they were covered.

Q. The cell was absolutely barren, except for the hole in the floor with the grate on it, is that right? A. If those officers did their job, that's the way it was.

Q. Do you specifically recall Cell Number 8 having the window in the cell being blocked over with a metal sheet? A. No, sir, that entire side was blocked over, and I'm not sure the date when it was done.

Q. There were no windows in any of the cells up there? A. The windows are there, they're covered over with a piece of sheet metal due to the fact that the security screens were bridged by some means.

Q. I just have one or two other questions, Mr. Burrell.

Can you identify this book? A. It says, the desk log on shifts, January 1, 1972, through January 13th, 1972.

Q. Do you know what this book is? A. It's a log book.

Q. Do you know for what section of the institution, it's from the Penitentiary? A. I don't know.

(493) Q. Could you examine it and try to determine if you can identify it? A. Yes, sir, it's evidently from the south wing, segregation unit.

Q. South wing log book? A. It's so indicated on the front.

Q. All right, sir.

(Mr. Morgan) We don't intend to introduce this whole book into evidence, Your Honor, but I would like to have Officer Burrell, with permission of counsel, read one entry on Page 1, Saturday, January 1st, 1972, 8:00 to 4:00 shift.

By Mr. Morgan:

Q. Eight to four, I assume means 8:00 to 4:00 shift, is that right? A. That is correct.

Q. About five-sixths of the way down the page, an entry with a star next to it, that says, 9:20, Milton McCray set his cell and contents on fire, he was removed from cell and escorted to MO per Capt. Burrell.

Is that an accurate statement of what that says? A. Yes.

Q. And that's an entry in this log book at 9:20 a.m. on January 1st of 1972, isn't it? A. It's there.

(Mr. Morgan) Okay, sir.

(494) I have no other questions, Mr. Burrell.

Thank you.

(Mr. Rosenthal) Just two short questions, Your Honor.

REDIRECT EXAMINATION

By Mr. Rosenthal:

Q. Number one, Mr. Burrell, when you made mention of the fact that you removed Mr. McCay's clothing and the mattress from the — was it the MO, or the — yes, the mental observation cell? A. When I removed it?

Q. No, when you ordered that it be removed? A. Yes, sir.

Q. And this was for what reason? A. For his own protection, as well as mainly — Mr. Morgan made reference to a man dying up there, I don't know which one they had, but I did have occasion where a man hung himself in that area, and it was not going to happen to me if I could help it.

Q. You mean by the use of— A. By the use of a mattress cover.

Q. Or his clothing? A. Well, he could very well have used his clothing, had he had any.

Q. Mr. Burrell, I show you one last paper, first of (495) all I show you this group of papers and ask if you can identify this folder? A. This is the weekend and holiday activity report, 1972-1973.

Q. And these are records of the Penitentiary? A. Yes, sir.

Q. Which are kept in the ordinary course of business? A. Yes, sir.

Q. And I refer you to report dated January 3, 1972, by whom is that report signed? A. Signed by me.

Q. And it's addressed to whom? A. Mr. Leonard F. Decker, Warden.

Q. And would you please read the entry with reference to security — the first line of the security information? A. MO was bathed, shaved, and given haircuts on January 1, 1972, by Officers Ebert, R. Stanton, Leak and Carpenter.

Q. Would there be any reason that any one person in the mental observation cells would not be bathed? A. Not to my knowledge.

(Mr. Rosenthal) No further questions, Your Honor.

Your witness.

(Mr. Morgan) No other questions, Mr. Burrell.

(496) (The Clerk) That's all, sir.

(The Court) All right.

Any other witnesses?

(Mr. Rosenthal) We have Mrs. Weber here, who is the nurse.

(The Court) All right.

(Mr. Rosenthal) Mrs. Weber, please come up, take the stand, please.

END OF VOLUME I

Supreme Court, U. S.
FILED
DEC 29 1975
MICHAEL RODAK, JR., CLERK

APPENDIX (Volume II)

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-44

ROBERT BURRELL, *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

SERGEANT V. D. SMITH, ETC., *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

GERALD McCLELLAN, ET AL., *Petitioners,*
v.
JAMES E. X. STOKES, *Respondent.*

DR. HAROLD M. BOSLOW AND
DR. DOMINGO C. SORONGON, *Petitioners,*
v.
JOHN WASHINGTON, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 9, 1975
CERTIORARI GRANTED NOVEMBER 3, 1975

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MRS. CHRISTINE B. WEBER,

was called as a witness for and on behalf of the Defendant, and, having been first duly sworn, testified as follows:

(The Clerk) Give your name for the record.

(The Witness) Mrs. Christine B. Weber, W-e-b-e-r.

(The Clerk) Thank you.

DIRECT EXAMINATION

By Mr. Rosenthal:

Q. Mrs. Weber, what is your present occupation? A. I'm Assistant Supervisor.

Q. Where? A. At the Maryland Penitentiary.

Q. And how long have you been so employed? A. 15 years.

Q. And you are a registered nurse? (497) A. Yes, sir.

Q. And you received your training where? A. At the University of Maryland Hospital.

Q. All right.

Now, you're familiar, I believe, with Mr. McCray? A. Yes, sir.

Q. And, as a matter of fact, you have in your hand the records pertaining to Mr. McCray incident to this particular fire, is that correct? A. Yes, sir.

Q. And I call your attention to the report of January 1st, 1972, is this report in your handwriting? A. Yes, sir.

Q. And that was the day of the fire? A. Yes, sir.

Q. And these records are made in the ordinary course of business at the Penitentiary? A. Yes, sir.

Q. And relate to records that must be kept in the ordinary course of business at the Penitentiary? A. Yes, sir.

Q. Now, I would ask that you read just the report of January 1st, 1972, which is in your handwriting. A. My writing is poor.

Pulse 130. Respiration 20 to 24. Patient states (498) he is already known to be an asthmatic. Given 30 cc of Elixophyllin. Patient very arrogant and refusing treatment of cold compresses, states he inhaled smoke from a fire in his cell. Officers stated he set fire to his cell and had a good big blaze before they could get an extinguisher. Refused eye compresses.

And I put, myself, a question mark because I couldn't imagine anyone refusing treatment.

Respirations became normal in depth and rate as soon as mind diverted by asking questions. No blisters or serious burned areas could be detected. Officer Martin applied cold compresses and bacitracin ointment to all areas stated by patient to have been burned or hurting. Eyes irrigated with cold water, ears washed out with cold water. No further symptoms. Condition seems satisfactory.

And at 11:15, Dr. Holljes advised of patient being placed in MO.

Q. All right.

Now, does it show what time Mr. McCray was first seen? A. I have 9:30.

Q. 9:30.

And what time was he released from the dispensary? A. Well, I'm not sure, there's only one nurse on duty on the holiday, or a weekend, and it was 11:15 — while (499) this was going on there were still inmates to be waited on in the dispensary, and it was 11:15 when I got a chance to call Dr. Holljes.

Q. Do you recall whether or not Mr. McCray was still present in the dispensary when you called Dr. Holljes? A. I can't remember.

(Mr. Rosenthal) Your Honor please, we would move this record to be introduced into evidence as Defendant's next exhibit, I believe it's Number 7.

(Mr. Morgan) May I see it, please?

(Handed.)

(Mr. Morgan) The Plaintiff has no objection to that.

(The Court) All right.

(The Clerk) Photo copy marked Defendant's Exhibit Number 7.

(Document was marked Defendant's Exhibit Number 7.)

(Mr. Rosenthal) Shall we continue, Your Honor, or do you want to see the report?

(The Court) Yes.

By Mr. Rosenthal:

Q. Referring to my copy, Mrs. Weber, when was the next time, according to the hospital records of the Penitentiary, that Mr. McCray was seen by a physician? (500) A. On January 4th he was seen by Dr. Wood.

Q. And the records relate that he was seen for a rash? A. Yes, sir. He complained of a rash on his face.

(Mr. Rosenthal) We would have no further questions, Your Honor.

You might have to hold that in case counsel has other questions.

(Mr. Morgan) Yes, may I see that?

(The Witness) Yes, sir.

(Handed.)

(Mr. Morgan) Oh, this is the same.

(The Witness) Yes, sir.

(Mr. Morgan) I see.

CROSS EXAMINATION

By Mr. Morgan:

Q. Mrs. Weber, you stated this is your handwriting? A. Yes, sir.

Q. Okay.

And this entry is made at what time, does it say? A. At 9:30, in the morning.

Q. 9:30? A. Yes, sir.

Q. Have you been in court all morning, Mrs. Weber, and heard the testimony? A. I got here just about 11:00.

(501) Q. Well, did you hear the testimony concerning the fire and did you hear Mr. Burrell say that the fire was about the most serious he had ever seen at the Penitentiary? A. Yes, sir.

Q. And his description of the photographs? A. Yes, sir.

Q. You state here that Mr. McCray had refused eye compresses.

Then it further states that he apparently — I'm having a little trouble reading your wirting.

Officer Martin applied cold compresses and, what's that, bacitracin ointment? A. Bacitracin.

Q. Bacitracin ointment.

So that medication was given to Mr. McCray, is that right? A. Yes, sir, but we had to — well, it took time, he was resistful, he was very angry and hostile, it took about four times as long to treat, you know, as the average person.

Q. Did he appear very upset? A. Well, he was angry, yes.

Q. He was agitated? A. Angry, yes, sir.

Q. Did he say why he was angry? (502) A. No. Sort of like, you know, blaming us for the fire.

(The Court) Like what?

(The Witness) He acted like he was blaming us for the fire.

By Mr. Morgan:

Q. And then it states here that his eyes were irrigated with cold water and washed out.

All right.

Now, at 11:15 a.m., the entry reads:

Dr. Holljes advised of patient being in MO. Instructed to call Dr. Stewart. No answer at office or home for Dr. Stewart. No further complaints or information from fourth floor.

That would be MO? A. Yes, sir.

Q. Concerning patient by 2:00 p.m. C. Weber, RN.

Now, do you recall ever having gotten in contact with Dr. Stewart about this matter? A. No, sir.

Q. Do you ever recall talking to Dr. Holljes again about the matter? A. No, because it wasn't deemed

necessary. If it had been necessary, I would have had to sit there on the phone and call him.

(503) Q. Well, you called Dr. Holljes one time, didn't you? A. Yes, sir, it's our policy, we always informed Dr. Holljes, when they're put in MO.

Q. And you called Dr. Stewart one time? A. I tried to call him, yes, sir.

Q. When you called both of those doctors, you felt it was necessary to call them, I assume? A. Well, Dr. Holljes is medical and Dr. Stewart is surgical, and Dr. Holljes just wished me to tell Dr. Stewart so that the next time in he would routinely see him.

Q. But you didn't feel it was necessary to call Dr. Holljes? A. I did it because it was our policy.

Q. I see.

Now, next entry is January 4th, 1971, and that was the day on which Mr. McCray had a visit with Dr. Wood, is that right? A. Yes, sir.

(The Court) Well, is that '71, or shouldn't it have been '72, is that a mistake there?

(The Witness) I think that's a mistake, yes, sir.

By Mr. Morgan:

Q. That kind of mistake occurs occasionally around the first of the year? (504) A. Right.

Q. Mrs. Weber, where did these pages come from, again? A. Well, we have sick call cards. You see, the files are kept on the second floor of the hospital.

Q. Ahuh. A. And we have a file cabinet with sick call cards on each person that comes to the dispensary.

Q. I see.

And every time that you would see an inmate, you would make a notation on the sick card? A. Well, we should, we're instructed to do so, but sometimes there are errors and sometimes they're not recorded.

Q. Well, would you say in the majority of cases you do make recordings? A. Yes, sir.

Q. Would you say that based on these records, Mr. McCray was not seen on the second floor, I suppose, at the hospital, between January 1st of 1972 and January 4th, 1972, is that correct? A. No, sir, that would be an assumption, I couldn't say that.

Q. Well, that's what the record shows, doesn't it? A. No, sir. You see, he was in MO, he would be seen as a patient—

(505) Q. I'm sorry? A. These are strictly for the dispensary.

Q. Yes. A. But when a patient is a patient in any other area than the dispensary, he would have a regular chart, and a doctor would dictate it.

Q. Oh, I see, that's not your duty at all, is that it? A. Well, I couldn't recall if I was on duty the rest of the week, I don't know this. You see, I don't have the chart, all I have is the card.

Q. Did you bring any records with you indicating— A. No, sir, I tried to get his chart, but they told me it had been signed out.

I couldn't refresh my memory on this.

Q. I see.

Mrs. Weber, did you state on direct testimony that these records in some way indicated when Mr. McCray was removed from MO, or didn't you state that? A. I couldn't say that, no, sir.

Q. I see.

But this does indicate when he came in? A. Yes, sir.

(Mr. Morgan) Fine.

I have no other questions.

Could I have just a second?

(506) We have no other questions.

Thank you.

(Mr. Rosenthal) We have no questions, Your Honor.

We would request Mrs. Weber be excused for the day.

(The Court) Fine.

(The Clerk) You may step down.

(The Court) All right, we will recess until 2:15.

(Whereupon, at 1:10 o'clock p.m., a luncheon recess was taken until 2:15 o'clock p.m.)

(507) AFTERNOON SESSION

(Met, pursuant to the taking of the recess, at 2:15 o'clock p.m.)

(The Court) All right.

Let's see, are you—

(Mr. Rosenthal) I have finished with Mrs. Weber, Your Honor.

The doctor is here, I understand he has an exam, we have some other exhibits to introduce, I think we ought to take the doctor first.

(Mr. Morgan) That's fine with me, Your Honor.

(The Court) Very well.

(Mr. Morgan) Dr. Gould.

DR. WILLIAM MICHAEL GOULD,

was called as a witness for and on behalf of the Plaintiff, and, having been first duly sworn, testified as follows:

(The Clerk) State your name, Doctor.

(The Witness) Dr. William Michael Gould, G-o-u-l-d.

(The Clerk) Thank you.

DIRECT EXAMINATION

By Mr. Morgan:

Q. May I have just a second, Your Honor, to find the appropriate pages of the medical reports.

(508) Dr. Gould, what is your profession? A. I'm a physician-dermatologist, specialist in dermatology.

Q. Could you explain to the Court what educational background you have? A. Well, I'm—

(Mr. Rosenthal) Your Honor please, we would submit that the doctor is qualified unless Mr. Morgan wants it on the record for a special purpose.

(Mr. Morgan) I think it would only take ten seconds, Your Honor.

(The Court) All right.

(The Witness) Well, an MD Degree from the University of Maryland, plus three years additional training in the specialty of dermatology, and I've been a Consultant for the Maryland Penitentiary for two years now in dermatology.

By Mr. Morgan:

Q. Dr. Gould, do you know the Plaintiff in this case, Milton McCray? A. Yes.

Q. Do you recall approximately the first time you had an occasion to meet Mr. McCray? A. It's hard to say, I would have to look at the records, but it was not in association with this case, he was a patient of mine before this incident arose.

(509) Q. You are familiar with the subject matter of this case? A. Right.

Q. And you had seen Mr. McCray prior to that time? A. Right.

Q. Had you seen him in your professional capacity as a dermatologist? A. Right.

Q. If you recall, and I can show you the records easily enough to refresh your memory if you need it, if you recall, during that — during the visits that you had with Mr. McCray prior to this incident, what was the nature of Mr. McCray's physical problem? A. He was suffering from neurodermatitis.

(The Court) Neuro, what?

(The Witness) Neurodermatitis.

This is a chronic eczema that is related a lot to nervous tension and is a chronic, itching type of eruption, it may be generalized or localized.

By Mr. Morgan:

Q. And your contacts with Mr. McCray had to do with that particular injury? A. Right.

Q. All right, sir.

Directing your attention particularly to the (510) incident we're concerned with here, I show you this file and ask you, first, if you can identify the file itself, and, second, if you can identify this page to which the file is open? A. Right.

Well, the file, of course, is his records. The pages you have opened here, it's my description of his problem when I was called to see him on January 13th of 1972.

Q. These are his medical records from the Penitentiary? A. Right.

Q. And this notation that you're referring to. January 13th, is that a notation that was written by you? A. Right.

Q. And it would have been written the same day that you— A. It was dictated that day and typed up within a week or so.

Q. All right, sir.

I think the simplest way to handle this would be if you would read through that notation that you made and in layman's terms explain exactly what you found with regard to Mr. McCray's physical condition and what you prescribed at that time. A. Okay.

I was called to see him approximately two weeks (511) after a fire in his cell, and at the time that I saw him on January 13th he had crusted lesions, crusted sores on each cheek and on his left ear and on—

(The Court) Wait a minute.

Crusted sores on each cheek?

(The Witness) On each cheek, on his left ear, and a small amount on his right ear, and he had a small area on the right side of his back, and he also had some sores on the knuckles of the right hand, and he also had some crusting inside of his nostrils, just inside his nostrils.

In examining him on the left ear, there was some initial peeling of the skin and yellowish crust in this area, and it appeared to be well healing at that time.

There was a tiny scar present over the right ear, but no secondary infection was present.

Symmetrically placed on each cheek, extending down to the corners of the nose, there was some blistering with yellowish secondarily infected crusting, and he had similar areas between his nostrils and inside the — just inside the nostrils.

And, also, he had an area of secondary infection, a crusted area on the right side of his back beneath the clavicle.

There was some hypopigmentation, in other words, (512) decreased pigment, on the knuckles of his right hand, which appeared to be healing, and one on the knuckle of the first finger, which appeared to be slightly infected.

He also had a healing burn on the right forearm, which did not appear to be infected at that time.

At that time, the diagnosis was first degree burns with some secondary pyoderm, which is a term meaning infection of the skin.

At that time, I prescribed some antibiotic ointment and washing the area with Gamophen, which is a type of antiseptic soap.

By Mr. Morgan:

Q. At the time you examined Mr. McCray, Dr. Gould, were you able to form a professional opinion of how the injuries that you saw on Mr. McCray were caused? A. They appeared to be burns, very typical burns.

Q. Is there any question in your mind that they were caused by burns? A. No.

Q. Dr. Gould, you mentioned in medical terms here, I believe, that there was an infection over perhaps some and perhaps all of these burns, is that correct? A. Yes, over some of them, yes.

(The Court) What?

(The Witness) Over some of them.

(513) By Mr. Morgan:

Q. And in your professional opinion, what was the cause of that infection? A. Well, infection is not uncommon on any burn, and, of course, you pick up infection in any area of skin injury, whether it be from a burn, or a cut, or a scrape, so a common — infections are a common result of any injury to the skin, so the infection comes from bacteria and bacteria come from everywhere, it could be just in the air, from the walls, it can be from inside of the nose.

Many people, most people carry bacteria inside their nose and it can infect other areas of the body if it has been injured.

Q. Dr. Gould, this report is dated January 13th of 1972, did you see Mr. McCray at any other time between January 1st and January 13th of 1972? A. No.

Q. There's no notation in the records there that you did see him any other time, is there? A. No.

Q. Dr. Gould, in your professional opinion, can you state at this time with a reasonable degree of medical certainty the nature of these injuries at the time they were inflicted on January 1st? A. I don't understand the question.

(514) Q. Well, I will rephrase the question.

In your professional opinion, are you able to state with a reasonable degree of medical certainty the extent of pain that the burns that you saw on January 13th would have caused at the time when they were fresh on January 1st?

(Mr. Rosenthal) I object, Your Honor.

(The Court) Oh, objection sustained.

(Mr. Rosenthal) I think it's a conclusion that these burns were placed on January 1st, also.

(Mr. Morgan) Well, if that's the basis of the objection—

(Mr. Rosenthal) No, it's not.

(Mr. Morgan) — I think it's quite clear that—

(Mr. Rosenthal) It's secondary.

(Mr. Morgan) Well, what is the basis of the objection?

(Mr. Rosenthal) The basis of the objection is—

(The Court) Well, you're asking him about the reasonable degree of pain, and the question resolves itself in a subjective matter and the doctor can tell people have a different threshold of pain.

Ask him with a reasonable degree of medical certainty how they occurred, might be — how the injuries which he saw — also ask him when they occurred.

(515) By Mr. Morgan:

Q. Dr. Gould, I believe you have already testified that you can tell with a reasonable degree of medical certainty, and, in fact, you said it was absolutely clear that the injury had been caused by burns, could you determine within a reasonable degree of medical certainty approximately when the burns occurred? A. Well, it's hard to pinpoint it, I'd say anywhere from — they were probably older than a week, that's all I can say with certainty.

Of course, I knew the history when I was called to see him, you know, as to when the burns occurred.

In looking at the burns, they looked like they had been there at least a week or so, some of them had already begun to heal and it's reasonable to say that it probably happened at least a week before I saw him.

Q. Dr. Gould, you have the records there, perhaps you could refresh your recollection by looking at them, approximately how many times prior to January 13th had you seen Mr. McCray concerning any other problem? A. The first time he had been seen, of course, followed by the dermatologist, Dr. Davis, who preceded me at the Penitentiary, I saw him for the first time on July 1st, 1971, and at that — since that time, or between that time and the time that this present episode occurred, I saw (516) him one, two, three, four — four times — a total of five times.

Q. The January time would have been the fifth of the sixth? A. Yes, that I had seen him.

Q. Yes, fifth, or yes, sixth? A. That would have been the sixth time, and, of course, I've seen him about four or five times since then.

Q. You stated, Dr. Gould, that the nature of Mr. McCray's medical problems, on all the other occasions on which you had seen him, had been neurodermatitis? A. Right, correct.

Q. Could you explain in your professional opinion the basis for the neurodermatitis which you found in Mr. McCray? A. Well, by implication, neurodermatitis is related to excessive emotional tension, nervous tension. No one really knows whether this is the direct cause of the condition, but it seems to be related to it.

The condition is a chronic itching, scaling type of eruption that many times the patients, if they're under emotional stress or tension, will have severe itching and difficulty with it and at other times when stress has eased up or if you are giving tranquilizer therapy, they'll have less trouble with it.

So, it's definitely related to tension, but whether (517) it causes it, or not, no one knows.

Q. Had you, prior to this time, formed an opinion as to Mr. McCray concerning the degree to which he is a tense person?

(Mr. Rosenthal) I object, Your Honor, as to relevancy.

(The Court) Yes.

I don't know what you're driving at, Counsellor.

(Mr. Morgan) Well, Your Honor, I think these questions are relevant. As Your Honor stated, the intensity of the suffering that Mr. McCray had as a result of these burns perhaps is related to the level of tolerance that he had to this kind of thing, and Dr. Gould having examined him four or five times in the past, I think is in a position to testify as to whether these kinds of burns would affect Mr. McCray in a way

different or the same or — different or the same as they would affect another person.

(The Court) You can't answer that, can you?

(The Witness) Well, I can read from my notes, even from the first time, concerning my feelings as far as the relationship between his dermatitis, his chronic dermatitis and anxiety and tension.

(The Court) Yes, that's all you know. You don't know anything else, as you say, you don't know—

(The Witness) Again—

(518) (The Court) Except it's related, apparently, to that sort of thing, of condition, therefore, you can't tell what the degree of pain is that he feels, can you, or anybody else

(The Witness) No, it's subjective.

(The Court) What?

(The Witness) Strictly subjective.

(The Court) Sure.

By Mr. Morgan:

Q. Dr. Gould, can you determine with a reasonable degree of medical certainty whether the burns you saw on Mr. McCray are the kind of burns that would in the normal situation cause at least a degree, an unsubstantiable degree of pain?

(Mr. Rosenthal) I object, Your Honor. I think the Plaintiff may be able to testify, but I'm not sure the doctor can.

(The Court) Well, it's reasonable to assume that he would say that it would cause pain, isn't it?

(The Witness) I would say that this is the type of burn, a first degree burn, that you might expect to get if you put your hand on a hot stove, a nonblistering type of burn that, as you know, is painful. The pain is usually over a short period of time, I would say. It's reasonable to assume that most of the pain, if treated with cold (519) conpresses, or something, is of temporary nature, it shouldn't last any more than several days, at the most.

By Mr. Morgan:

Q. You stated this kind of a burn — let me — you stated that the pain itself would not last more than a couple of days? A. It shouldn't.

Q. But the physical manifestations of the burn, you've already testified, have lasted some period longer, is that correct? A. He had complicated burns.

(Mr. Rosenthal) I don't remember him testifying to that, Your Honor.

(Mr. Morgan) Well, I think maybe I interpreted what he said inasmuch as—

(The Court) Yes.

Well, he can testify as to that, Mr. Morgan, but you can't.

By Mr. Morgan:

Q. Dr. Gould, you testified just a second ago, I believe, that the kind of burns which you saw are not the kind of burns that cause blistering, is that correct? A. He had some blistering, as I remember reading it, I think, on his — some crusting, what appeared to have been blisters — let me just check it.

(520) On the cheeks, I had noticed some crusting that looked like they were blisters at the time, the others were just areas of healing, a burn.

Q. Is it possible, Doctor, to determine with a reasonable degree of medical certainty the length of time after burns such as these were inflicted that blistering would occur? A. Of course, it depends on the heat, but, generally, a burn can develop blisters anywhere from the same day up to two or three days after the burn, the blisters can appear.

Q. What would you say would be the minimum period of time? A. I would say a minimum, maybe I'd say three hours or so. If he had a severe, like second degree burns, the blistering should appear within several hours. In a first degree burn, it's sort of in between, it could appear anywhere up to several days.

Q. I see.

In other words, the minimum period of time, then, would be for — would be three hours, did you say? A. Several hours.

Q. Several hours.

(Mr. Morgan) I have no other questions, Dr. Gould.

(521) I do have a copy of the page of the medical records you have been reading from that I would like to introduce into evidence.

(The Court) What is the number of that, Mr. Graham?

(The Clerk) Are you offering it in evidence?

(Mr. Morgan) Yes.

(The Clerk) Plaintiff's Exhibit Number 5.

(Document was marked Plaintiff's Exhibit Number 5.)

(The Court) All right.

CROSS EXAMINATION

By Mr. Rosenthal:

Q. Dr. Gould, in your report, you make mention of an area on his back.

Now, this, also, was caused by the fire? A. Apparently.

Q. Is it possible that these wounds or infections could have been caused by something other than actual fire burns; in other words, like from a light that someone touched, or touched to themselves, a hot light, a light bulb, I should say? A. Certainly could have been, they were burns, and, you know, how they were — there are many ways to inflict burns, they all look the same.

Q. Now, referring, also, to the same book, I refer to (522) your report of October 7, 1971, and these records, Doctor, are kept in the ordinary course of business at the Penitentiary and it is the medical records of Mr. McCray, is that correct? A. Yes.

Q. Right.

Now, would you please read this report, very briefly; it's rather short, Your Honor. A. This report was written to Mr. Decker at the Penitentiary, and—

(Mr. Morgan) Excuse me, Dr. Gould.

Do you intend to introduce this report in evidence?

(Mr. Rosenthal) Yes, I will introduce it, Your Honor, I do not have the photo copies here, but would reserve the right to introduce that.

(Mr. Morgan) Well, the Plaintiff would object on the basis of relevancy, Your Honor.

If what we're talking about is medical reports that are in the medical file, that we would have no objection to. If it's a memorandum to the Warden concerning Mr. McCray, concerning an incident unrelated to these incidents, then we would say it's not relevant.

(Mr. Rosenthal) Your Honor please, I think it is related because it goes into the neurodermatitis that the (523) doctor was referring to.

(The Court) I will permit it.

Objection overruled.

By Mr. Rosenthal:

Q. Just summarize that, very briefly. A. Okay.

Q. If you don't want to read it. A. I had been following Mr. McCray on a number of occasions and this was written on October 7th, 1971, and I stated that this patient has been seen here on five occasions since July 1st, 1971. He has been followed for a chronic neurodermatitis, which has been under control, and most of these lesions, or lesions that he has, are self-inflicted.

By this, we mean caused by his own scratching, not deliberately self-inflicted, but involuntarily self-inflicted.

In the past three or four times that he has been here, he has been threatening and very abusive in language concerning the fact that I will not give him a pass to grow a beard.

(The Court) What?

(The Witness) To grow a beard.

The patient's face problem is extremely mild, and he shows only an occasional acne pimple. I explained to him that I do not give shaving passes for this mild condition, only for keloid formation — which is scar formation, it's (524) a form of scar tissue.

Due to this patient's threatening manner, I am discharging him from clinic and will not see him again.

This was on October 7, 1971, and I didn't see him after that until the time of the present incident.

By Mr. Rosenthal:

Q. Now, Doctor, are you familiar with the date of the fire? A. No.

I'm familiar with the date I saw him.

Q. All right, if I told you — well, I will tell you that the fire took place on January 1, 1972, and I show you here a report of Dr. Holljes, one dated January 6, 1972, and the other dated January 18, 1972.

Now, the January 6 would have been after the fire, Doctor, and before you saw him on the 13th, is that correct? A. Correct.

(Mr. Rosenthal) If Your Honor please, we would — and these do refer directly to the fire, we would also ask that the two reports of Dr. Holljes be introduced into evidence, and I will have to get copies for the Court and for counsel.

(The Court) All right.

Now, wait a minute, you're getting a copy of (525) October 7, 1971, and then you've got — show them to Mr. Graham and let's get them marked, this will be Defendant's exhibit what, Mr. Graham, the October 7 report?

(The Clerk) That will be Defendant's Exhibit Number 8.

(Document was marked Defendant's Exhibit Number 8.)

(The Clerk) Dr. Gould's report — this.

(The Court) What?

(Mr. Rosenthal) The other ones will be Number 9, Your Honor.

(The Court) What date are they?

(Mr. Rosenthal) They are January 6, 1972, and January 18, 1972, both by Dr. Holljes, January 6 and 18, Your Honor.

(The Clerk) That will be Defendant's Exhibit Number 9, and you will give me the photo copies.

(Document was marked Defendant's Exhibit Number 9.)

(Mr. Morgan) Your Honor, for the record, the Plaintiff would object to the admission of those two reports.

(The Court) The basis, Counsellor, of the objection.

(Mr. Morgan) The basis of the objection, Your Honor, would be that Dr. Holljes is the present Penitentiary (526) doctor and he is available to come and testify. These documents are hearsay and we can see no reason why, if they are to be introduced and if they are relevant, that Dr. Holljes can't come and be cross-examined on them.

(Mr. Rosenthal) Your Honor please, Dr. Gould has already testified that these are the ordinary records kept in the—

(The Court) I know, but—

(Mr. Rosenthal) I can bring Dr. Holljes over.

(The Court) All right, you better do that.

Read the report and then we can bring him over, too.

You can bring him over and introduce those reports, Counsellor.

(Mr. Rosenthal) Yes.

(The Court) Introduce the reports at that time, but if you want Dr. Gould to comment on the reports, I see no reason why he can't.

(Mr. Rosenthal) Yes, I would like him to comment on the report of Dr. Holljes dated January 6.

(The Court) Read it out loud, will you, Doctor?

(The Witness) The report is dated January 6, Dr. Holljes, and I'm just quoting here.

This patient is reported to me. Said he set his (527) cell on fire and that he was taken to the hospital where he was seen by a Dr. Wood. Treatment was prescribed for him and x-ray of the chest was ordered. Later he was transferred to the south wing security cell. Apparently the chest x-ray has not been done yet. Patient seen today and seemed normal. Complains that his dermatology medication has been discontinued. This was prior medication. He has some lesions on his face which look like granulated. Lesions may be the result of burns secondarily infected. He should be seen by Dr. Gould at his next clinic and a chest x-ray should be obtained. Also I note that Mr. Musk is seeing him and direct arrangements are being made for him to see the psychiatrist.

Mr. Musk is the psychologist.

(Mr. Rosenthal) That will be all that we would have of Dr. Gould, Your Honor.

(The Court) Do you want Dr. Gould over, Mr. Morgan?

(Mr. Morgan) Dr. Holljes, you mean, Your Honor?

(The Court) Dr. Holljes.

(Mr. Morgan) As Dr. Gould was reading that report, I admit I haven't read it in a while, if I could have just a second, Your Honor, to reread what he just read, we may withdraw our objection.

(The Court) All right.

(Mr. Morgan) Your Honor, of the two entries here, (528) we would — and I think there is already evidence in the case concerning this, a visit by Dr. Wood occurred on January 4th.

(The Court) Yes.

(Mr. Morgan) And if the State is willing to stipulate that the visit by Dr. Wood referred to here is the

January 4th visit, then we will withdraw our objection to these two documents.

(The Court) All right, then you won't need Dr. Holljes?

(Mr. Morgan) We won't need Dr. Holljes.

(The Court) All right.

(Mr. Rosenthal) We so stipulate, Your Honor.

(The Court) Now, are you through with the doctor?

(Mr. Rosenthal) Yes, sir.

(The Court) Do you want to ask Dr. Gould any more?

(Mr. Morgan) I may have just one or two more questions, Your Honor.

(The Court) All right.

REDIRECT EXAMINATION

By Mr. Morgan:

Q. Dr. Gould, are you familiar with the mental observation cells at the Maryland Penitentiary? A. Yes.

(Mr. Rosenthal) Your Honor please, I would object, (529) I don't think this was covered on direct or cross.

(The Court) Nevertheless, I will permit it.

Objection overruled.

By Mr. Morgan:

Q. Are you familiar with the mental observation cells, have you actually seen the cells yourself? A. Yes.

Q. Are you familiar with the mental observation cell, Number 8, specifically? A. No.

Q. Is there any difference between the mental observation cells? A. Not that I'm aware of, I've only seen them once.

Q. On that one occasion when you saw them, could you describe what you saw? A. The cells themselves have a solid iron door, they have a double door, a solid iron door which when opened is then — opens to a

barred door which you can then see through, the cells themselves are bare, they have a bare tile floor, and they have essentially nothing in them, other than the tile floor and sort of a rudimentary toilet.

Q. Dr. Gould, can you determine within a reasonable degree of medical certainty whether confinement in such a cell of a person with burns, such as those you diagnosed on Mr. McCray, would exacerbate the nature of the injury?

(530) (Mr. Rosenthal) I would object, Your Honor.

(The Court) Yes.

Objection sustained.

I don't think — you're asking a hypothetical question and you've left out some of the thing that should be interpolated into that question, Counsellor.

By Mr. Morgan:

Q. Dr. Gould, the testimony in this case has indicated that Mr. McCray, the Plaintiff, was placed in the mental observation cells on January 1st, 1972, in the morning, and was released from there about the same time on January 3rd, during that period of time he was in a mental observation cell, as you described, barren of any fixtures or barren of any other belonging, and without clothing.

Based on those facts, assuming that they are the facts, based on the condition of the mental observation cell, the physical condition of the mental observation cell as you saw it, can you determine within a reasonable degree of medical certainty whether a person who was confined in that cell under those conditions for a period of two days with the burns as you saw then on Mr. McCray on January 13, whether that confinement would tend to exacerbate the severity of the burns?

(Mr. Rosenthal) If Your Honor please, we would object because I think the hypothetical takes for granted (531) that the type of burns Dr. Gould saw on the 13th did, in fact, exist on the 1st.

(The Court) Yes, it does; nor does it take into consideration any of the treatment which was given him immediately when he came out of the fire and the report which is contained in Exhibit Number 7.

(Mr. Morgan) Well, in that case, Your Honor, we'll withdraw that question.

Your Honor, we're having some difficulty determining which is Exhibit 7.

(The Court) It's the nurse's report, plus Dr. Wood's report.

(Mr. Morgan) I see.

All right, Your Honor.

(The Court) Have you got a copy of Exhibit 7 — it's this thing here, Counsellor.

(Mr. Morgan) Oh, the nurse's report.

(The Court) And also Dr. Wood's report.

(Mr. Morgan) I see.

All right, Your Honor, we have no further questions.

(The Court) All right, would you hand the doctor your copy, one of you, I want to ask him some questions.

It's Defendant's Exhibit 7.

(Mr. Rosenthal) I think I gave my copy to the (532) nurse and I don't think she gave it back.

(The Court) Do you have one?

(Mr. Morgan) It seems like we did, Your Honor, but I'm not sure where it is.

(Handed to the doctor.)

(The Court) All right, Doctor, take a look at that where you see 1/1/72, 0930, do you see it up there?

(The Witness) Right.

(The Court) Now, read that out loud to us, will you?

(The Witness) This is the nurse's notes.

(The Court) Yes.

(The Witness) Pulse 130, respiration 20 to 24. Patient states he is already known to be an asthmatic. Given 30cc Elixophyllin — which is an anti-asthma medicine.

Patient very arrogant and refusing treatment of cold compresses, states that he inhaled smoke from a fire in his cell. Officers stated he set fire to his cell, he had a good big blaze before they could get an extinguisher — got a fire extinguisher.

(The Court) Got an extinguisher.

(The Witness) I think got a fire extinguisher.

(The Court) Yes.

(The Witness) He refused eye compresses. Respira- (533) tions became normal in depth and rate as soon as mind diverted by asking questions. No blisters or serious burned areas could be detected. Officer Martin applied cold compresses and bacitracin ointment to all areas—

(The Court) Now, wait a minute, what is that ointment?

(The Witness) Bacitracin is an antibiotic ointment.

(The Court) Yes.

In other words, it was to treat for the possible infection?

(The Witness) Right.

(The Court) Okay.

(The Witness) In other words, they said they didn't see any blisters or serious burned areas. Officer Martin applied cold compresses and bacitracin ointment to all areas stated by patient to have been burned or hurting. Eyes were irrigated with cold water, ears were washed out with cold water. No further symptoms. Condition seems satisfactory.

Signed by Mrs. Weber, RN.

And then, 11:15, Dr. Holljes was advised, this was a.m. Dr. Holljes advised of patient being in MO — mental observation; and he instructed the nurse to call Dr. Stewart. She was not able — there was no answer at the office or home for Dr. Stewart. No further complaints or (534) information from fourth floor concerning patient by 2:00 p.m.

Again signed by Mrs. Weber.

(The Court) All right.

Now, that treatment that you see that was given there, the notes indicate, would that be the ordinary treatment that would be given for burns?

(The Witness) Yes, cold compresses, especially.

(The Court) Yes.

All right.

Now, read that notation down there, 1/4/71, which we all agree is really January 4th, 1972.

(The Witness) Yes.

This was a note, says, temperature 98.6, oral. Above noted, meaning he read the above note I just read.

Patient says he has cough. Also complains of rash on face. Blood pressure 120/80. Pulse 80, regular. Respirations 12. H-e-e-n-t, meaning head, eyes, ears, nose and throat, unremarkable. Chest — bronchi bilateral clear on coughing. This bronchi is a type of rattle or wheeze and when they clear on coughing it usually means your upper respiratory, not in the lungs itself.

(The Court) Yes.

(The Witness) Heart is n-s-r, which means normal sinus rhythm, normal heart rate. No — there's an abbreviation (535) for murmurs, heart murmers. The abdomen is soft, nontender. Examining his skin—

(The Court) Yes.

(The Witness) Patient has erythemia — redness — over the malar — which is the cheeks — area of face.

And that was all that was noted.

And than disposition, he ordered a chest x-ray, he ordered the face washed with pHisoHex and water, and—

(The Court) What does that mean, now?

(The Witness) pHisoHex is just a — not FDA approved but it's an antiseptic soap to prevent secondary infection.

His face was washed with that, and he ordered some hydrocortisone cream one per cent. This is a cortisone cream to cut down on irritations.

(The Court) Ahuh.

And then he got sick call in the morning?

(The Witness) Sick call in the morning.

(The Court) Is that treatment the ordinary treatment, reasonable treatment, that should be given in this particular situation?

(The Witness) Yes, sir, I would say it is.

(The Court) And you don't notice anything unusual about his condition at that time, right?

(The Witness) Not from the description on the chart, no.

(536) (The Court) So, this treatment was perfectly proper and reasonable under the circumstances, according to what a doctor would ordinarily prescribe?

(The Witness) Yes.

(The Court) And do?

(The Witness) Yes.

(The Court) Okay.

(Mr. Morgan) I just have one other question.

By Mr. Morgan:

Q. Dr. Gould, the treatment that you read there and described as being the appropriate treatment, is that the kind of treatment that should be administered on one occasion after a person is burned, or is it the kind of treatment that should be administered over a continuing period of time? A. That depends on the, you know, the burn itself, but I would say that any type of treatment like this, certainly is generally continued for several, three or four days, maybe.

Q. Would you say that it would be proper to continue it for a three or four-day period? A. Yes.

Q. It would be medically sound practice to continue it? A. Sure.

(537) (Mr. Morgan) Fine.

Well, thank you, Dr. Gould.

RECROSS EXAMINATION

By Mr. Rosenthal:

Q. Just one last question, Doctor.

Assuming, now, the records so far show that on January 4th he was treated, January 1st, excuse me, by Mrs. Weber and Sgt. Martin.

On January 4th, he was treated by Dr. Wood.

On January 6th, which is the record you just read, he was seen by Dr. Holljes.

So that was a period of five days, he was seen three times within six days.

Would this seem to be rather normal, or sufficient? A. Well, yes.

Q. Could it be sufficient? A. Certainly, in view of what was described here.

Q. All right.

Now, one last question.

With the neurodermatitis that Mr. McCray has had since you've known him, if there was some minor irritation that was treated on these three days, but then continuous scratching of the cheeks, or whatever it may be, could this have been what caused the actual infection to develop?

(538) (Mr. Morgan) Your Honor, I object to that question the grounds that Mr. Rosenthal stated in the question, minor irritation, and I think the implication is that a minor irritation is being increased in intensity by the person's own—

(The Court) I agree with you, Counsellor.

Objection sustained.

However, I think if the question is changed to take into consideration the condition described in the note of 1/1/72 and 1/4/72, would this be—

(Mr. Rosenthal) And 1/6/72, Your Honor.

(The Court) Yes, and 1/6/72.

(The Witness) I can't specifically relate the two conditions.

In other words, the fact that he had neurodermatitis in another area wouldn't necessarily mean he would be scratching a burn, which is not related to neurodermatitis; in other words, he had burned areas that were not related to where his chronic neurodermatitis was, and I can't see that the neurodermatitis would make him scratch the burns any more.

By Mr. Rosenthal:

Q. Well, would not there be a condition if someone were sunburned, Doctor, isn't there a scratching, peeling sensation? (539) A. Sure.

Q. And could this not lead from a standpoint, considering the reports to the Plaintiff following the same course of action of someone who would be sunburned? A. Yes, you can equate the two, sunburn and this type of burn.

(Mr. Rosenthal) I have no further questions, Your Honor.

(The Court) All right, do you have anything?

(Mr. Morgan) No, Your Honor, we don't.

(The Court) Thank you, Doctor.

(Mr. Rosenthal) Thank you very much.

(Mr. Morgan) Thank you, Dr. Gould.

(Mr. Morgan) Your Honor, we have no further witnesses, and I believe the State has also closed it case.

I would like to ask Mr. McCray a few questions on rebuttal.

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(540) MILTON McCRAY,

the Plaintiff, resumed the witness stand, and, having been previously duly sworn, testified further, as follows:

DIRECT EXAMINATION

By Mr. Morgan:

Q. Mr. McCray, the medical records that have been introduced in this case as part of the Defendant's exhibits, I will read two entries to you from them, and ask you if they are correct.

I'm not sure of the number of this exhibit, but it deals with Pages 51, 52 and 53 of the hospital—

(The Court) Yes, 51, 52 and 53 isn't it?

(Mr. Morgan) As a matter of fact, this is Defendant's Exhibit 2C.

By Mr. Morgan:

Q. It states at 2:00 o'clock, Mr. McCray, on January 1st, 1972, the first day on which you were in MO:

All inmates received water, and Inmates James Hawkins and Milton McCray received medication.

Did you receive medication at 2:00 o'clock on January 1st in MO? A. No medication.

Q. You did not.

Q. Of any kind? (541) A. None at all.

My request for medication was denied by the officer because according to him he was instructed not to give me anything until I saw a doctor.

Q. On January 2nd, Mr. McCray, at 8:00 o'clock a.m. on the 8:00 to 4:00 shift:

Roger Ray, Alphonso Bunn, Albert Daniels received medication in their food, and James Hawkins, Milton McCray, received medication as prescribed.

At 8:00 o'clock on January 2nd, 1972, Mr. McCray, did you receive medication of any kind? A. No medication, I didn't receive any medication.

Q. Mr. McCray, in the other exhibits introduced this morning, there was a notation concerning MO, and I believe January 1st, 1972 was the date, indicating that MO, not listing specific inmates, but saying, MO was bathed, shaved and hair cuts, January 1st, 1972.

Did you receive any of those three things on January 1st, 1972? A. I didn't. I don't know about any other inmates. I didn't see any other inmates being bathed at that time.

Q. Bathed, shaved or hair cut? A. Bathed, shaved or a hair cut during that time.

If they did, I would have — as bad as I wanted a bath, I would remember, and requested it.

(542) (Mr. Morgan) Thank you, Mr. McCray.

No other questions.

(The Court) Now, Mr. McCray, after you returned back to — after you got out of MO, where did you go?

(The Witness) Back to south wing.

(The Court) South wing?

(The Witness) Yes, sir.

(The Court) And did you receive a bath when you got back to south wing?

(The Witness) No, not until that Saturday, that was the day of the shower, during that time, I didn't get any special shower, no.

(The Court) Did you get a special shower on the 6th of January?

(The Witness) On the 6th of January?

(The Court) That would have been Thursday, or something, wouldn't it?

(The Witness) No; no, sir.

(The Court) That's the day you went and saw Dr. Holljes, wasn't it?

(The Witness) I have heard him refer to me seeing Dr. Holljes on that particular day, and I can't even remember seeing Dr. Holljes, at all, during that time.

(The Court) Well, do you think Dr. Holljes just made that up?

(543) (The Witness) I'm not saying he made that up, I'm saying that I can't recall seeing him at that particular time.

(The Court) There is a notation in your medical records there that you did see him.

(The Witness) Dr. Holljes—

(The Court) Do you remember seeing Dr. Wood?

(The Witness) I remember seeing Dr. Wood on the night of the 4th because I made a special request to Mr. — Major Mills on the night shift concerning my burns, and he saw that — I told him that I hadn't seen a doctor since the fire and he made special arrangements. I think, as a matter of fact, he took me down himself.

(The Court) All right, did you have a chest x-ray that night?

(The Witness) No, not by Dr. Wood. Dr. Wood — well, he was a temporary diagnostic doctor and I didn't get any chest x-ray that night, no. He just checked my wounds and he prescribed medication and told me — and he made a notation that I should see the next day's sick call doctor.

(The Court) Well, did you see the sick call doctor the next day?

(The Witness) No; no, sir.

(The Court) Why didn't you?

(544) (The Witness) Nobody took me to see him, or I wasn't called.

(The Court) Now, when did you go back to the regular population?

(The Witness) From that particular incident, I assume it was quite a while, about a month or so, as a result of my charges, I think it was 60 days I was given.

(The Court) Oh, yes, that's right.

(The Witness) I stayed over there for 30 days and they let me off, I think, for good behavior, they evaluate you, put you in front of this — every 30 days, and I was released in 30 days, and sent—

(The Court) All right.

(Mr. Rosenthal) Just two fast questions.

CROSS EXAMINATION

By Mr. Rosenthal:

Q. Mr. McCray, let me try to refresh your memory, you were released from IC on January 27th, 1972, does that sound about right? A. That sounds about right.

Q. And where you testified previously with regard to this case, you testified that you had burns on your cheeks and face and hands, is that correct? A. Yes.

Q. Now, you said your clothing at the bottom of your (545) legs were burned, but you didn't mention — there were no burns on your feet or legs— A. No.

Q. —is that correct? A. None at all.

Q. And there were no burns that you testified to on your back? A. Well, I didn't mention it, but now that — I just remembered after being — after hearing that he gave me — I mean, Dr. Gould, he gave me a complete check that particular day, had to take off all my clothes.

Q. Now, you remembered everything except the burns to your back, is that correct? A. I remember the burns on my back also, I just didn't mention them.

Q. But you mentioned the other burns? A. Yes, because they are the ones that seemed to be most outstanding.

(Mr. Rosenthal) I have no further questions, Your Honor.

(The Court) All right.

(Mr. Morgan) Your Honor, I don't think it's too important, but I notice on the part of the base file we have gathered during discovery, it says, March 2nd, 1972, note, assignment change from segregation to school library, (546) cell change from IC1 to C509.

So, I assume that it was March 2nd, 1972, and not February—

(Mr. Rosenthal) January 27—

(Mr. Morgan) Well, there is nothing in here that indicates that, I don't believe.

I don't think it's too important to worry about it.

Thank you, Mr. McCray.

That's all.

(The Court) All right.

(Mr. Morgan) Your Honor, I have Defendant's 2C, the original, which was loaned us during the luncheon break.

(The Court) All right.

(Mr. Morgan) To make some copies.

Your Honor, I might note with regard to that exhibit, there was some cross-examination of Mr. McCray earlier in the trial concerning his possibly having injured his hand as a result of banging on the doors, or something, and on Page 53 of this particular exhibit, at the 11:00 o'clock entry, it indicates that that, in fact, did happen in MO, but that it was Inmate Bunn who was banging on the door with his right hand and it was he who had to have an x-ray done by Dr. Holljes.

(547) (The Court) All right, anything else, Gentlemen?

(Mr. Morgan) We have nothing else, Your Honor.

Thank you.

(Mr. Rosenthal) Your Honor, during the noon recess, at our luncheon break, I took the liberty of photostating additional copies out of Mr. McCray's base file pertaining to the actual fire incident and the reports that were actually made by the officers, these reports came in, because Mr. Morgan raised the possibility that the other reports that were sent to Dr. Burrell — excuse me, Mr. Burrell, may not have been in due course of business.

We would at this point ask that the actual reports that are in the base file be introduced into evidence as Defendant's exhibits. There are five total pages which incorporate the reports we already have in and we would submit that, the Defendant's exhibit, I think it's either Number 9 or Number 10, A to E.

(Mr. Morgan) We have no objection to the substitution, Your Honor, but I think to try to introduce new evidence at this point without a witness on the stand is improper.

(The Court) Well, he's not doing that, is he?

(Mr. Morgan) Well, I don't know.

If it's just a straight substitution, that's fine.

(The Court) Isn't it just a straight substitution?

(Mr. Rosenthal) No, Your Honor, I think it may be (548) one exhibit that Mr. Burrell testified to that is not included in the base file that—

(The Court) Well, put him back on the stand, let's get it in, I want everything in that you can possibly get in.

ROBERT BURRELL,

resumed the witness stand, and, having been previously duly sworn, testified further, as follows:

(The Court) Go on.

Well, wait a minute, let's get this straight about the substitutions.

What are you substituting?

(Mr. Rosenthal) Your Honor please, you will recall that Mr. Burrell had certain exhibits, reports furnished to him.

(The Court) Yes.

(Mr. Rosenthal) These are by Mr. — Sgt. Witte and by—

(The Court) What are the numbers?

Wait a minute, let me get this.

(Discussion with Clerk, off the record.)

(The Court) Report from Martin, report from Witte, special report from Alston, right?

(Mr. Rosenthal) Yes, sir.

(549) (The Court) And then there's a memo of — which there was no objection to, as I remember it, January 4, just saying that McCray was escorted to Dr. Wood, received treatment for spots he had on his face, after treatment he returned to his quarters.

Now, the others, they are the same reports you got out of the file, right?

(Mr. Rosenthal) Yes, sir, Your Honor.

(The Court) Do you have any — what do you want to do, substitute—

(Mr. Rosenthal) Your Honor, I only made mention of that, Your Honor, because of the possible objection by Mr. Morgan that maybe the records that Mr. Burrell had were not in the ordinary course of business.

We disagree with that, as has the Court.

(The Court) Well, I ruled on that and let them in over Mr. Morgan's objection, saying they were in the ordinary course.

(Mr. Rosenthal) Then we have no further evidence, Your Honor.

(The Court) Well, I thought you had one other, don't you?

What I'm referring to is the January 1st letter to Captain Burrell from Martin. The January 1st letter to Warden from Sgt. Witte.

(550) (Mr. Rosenthal) Yes, sir.

(The Court) The January 1st letter to the adjustment team from Cpl. Alston, right?

(Mr. Rosenthal) Yes, sir.

(The Court) And January the 4th, notation to Capt. Burrell from Major F. R. Clingenpeel.

(The Witness) Clingenpeel, sir.

(The Court) Clingenpeel?

(The Witness) Yes, sir.

(The Court) Now, what is the other?

(Mr. Rosenthal) There's only one, Your Honor, that we would like to introduce at this time and this is the report of—

Was it Officer White? R. O. White?

(The Witness) There is an Officer R. O. White there.

I really don't know what you're talking about.

(The Court) Has Mr. Morgan seen this?

(Mr. Morgan) I think I see it right here.

(The Court) All right.

(Mr. Morgan) And I hate to object to this again, Your Honor, but there is a notation on this page, if they seek to introduce, it says, over, in parentheses, which indicates to me there's something that should be on the back (551) of it, and our discovery indicates the same thing, it seems like the whole thing should be introduced.

(The Court) Sure.

(Mr. Morgan) If it's going to be introduced.

(Mr. Rosenthal) The only thing on the reverse side, Your Honor, which I'll show Mr. Morgan, was the results of the adjustment hearing based on this violation.

(Mr. Morgan) Well, the other side is quite relevant, Your Honor, because this side—

(Mr. Rosenthal) We would have no objection to putting the other side in.

(The Court) Well, all right, put both sides in.

(Mr. Rosenthal) We will have to photostat that, along with the other, Your Honor, and bring it back this afternoon.

(The Court) All right.

(Mr. Rosenthal) But it will be the report of Mr. White, Officer R. O. White, who was an officer at the time, and it is relevant to the fire.

(Mr. Morgan) For the record, Your Honor, we will object to both sides of this report coming in, just simply

because it has nothing to do with Mr. Burrell, it's just a Penitentiary disciplinary report written that has a lot of subjective information. If it's admissible, it certainly is (552) entitled to very little weight, I would think.

(The Court) Well, okay, I will admit it and consider the weight when I have it.

What is the number of it?

(The Clerk) Defendant's Exhibit Number 10.

(Document was marked Defendant's Exhibit Number 10.)

(The Court) All right, you get the other side.

(Mr. Rosenthal) Yes, I shall, Your Honor.

(Shown to Court.)

(The Court) All right.

Now, anything else that you want in, Mr. Morgan, or you, Mr. Rosenthal?

(Mr. Rosenthal) No, but I have one motion to make, Your Honor, if Mr. Morgan is finished. We're finished with formal introduction of any evidence.

(Mr. Morgan) Your Honor, before we get to that, I think I have a copy of the other side myself and we can just—

(The Court) Fine, put it in right now then.

(Mr. Rosenthal) Fine.

(Mr. Morgan) Clear that up.

(Mr. Rosenthal) Counsel for the Defendant has been furnished with the front and back side of what will be the Defendant's Exhibit Number 10.

(553) (The Court) All right.

(Mr. Rosenthal) On behalf of the Defendants, collectively, in this case, Your Honor, the Court has been quite lenient with both sides in the introduction of evidence and testimony because of the various witnesses and exhibits that have come in, and we would move that all of the exhibits, where applicable, that have been introduced, be used in the various cases.

Now, the one that I refer to specifically, Your Honor, is that in this instant case the record of Mr. McCray did come into evidence, and I'm just a little skeptical of the possibility because of the way the transcript reads if, in fact, any appeal is taken, that Mr. McCray, or counsel, or his new counsel, would state, well, no, that evidence came in when we were talking about this hearing, and, therefore, it can't be admissible, and so forth.

(The Court) Well, I think it was agreed that the record would be admissible in all the cases, wasn't it, Mr. Morgan?

(Mr. Morgan) Yes, sir, the record of prior convictions.

(The Court) All right, Mrs. Ross, make a notation to that effect; the record is admitted in all of the four cases we have here.

Okay?

(554) (Mr. Rosenthal) Well, again, Your Honor, the only thing I want to guard against is the possibility that if something came in on Monday, or out of order, that we don't get hit later on, I use that word very loosely, with some objection that it can't be used because it did not come in at the proper point of time.

(The Court) Well, I don't think Mr. Morgan or Mr. McCray argues that, right, Mr. McCray?

(The Plaintiff) I think my counsel is better qualified to answer that.

(The Court) What?

(The Plaintiff) I think my counsel is better qualified to answer that.

(The Court) Well, you've got him speaking for you, but I don't want you to take advantage of—

(Mr. Morgan) I don't think that will be a problem, Your Honor. If there's some piece of evidence that there is some confusion about, we can certainly figure out where it came in, go over the record again and figure out where it came in.

(The Court) I would think so, you've got joint exhibits in here, for example, we've got a number of things, you know, that's in the Rutherford case.

All right, is there anything else, Gentlemen, that you can think of?

(555) Mr. Morgan We have nothing else, Your Honor.

(Mr. Rosenthal) We have nothing further, Your Honor.

(The Court) All right, Gentlemen.

The Court will take it under advisement and I will see counsel in my Chambers after you all get a chance.

All right, do you want to submit a brief on this?

(Mr. Morgan) Yes, Your Honor, on both cases, and we also owe you a memo on exhaustion and a memo in this case.

(The Court) All right.

(Concluded at 3:25 o'clock p.m.)

Washington v. Boslow — 73-1025-N

DOCKET ENTRIES

1973

October 16—(1) Civil Rights Complaint.

October 16—(2) Order of Court (Northrop, C.J.) granting leave to file in forma pauperis and directing the Clerk to issue a summons thereon and direct the United States Marshal to serve summons and copies of the complaint on the Office of the Attorney General of Maryland and defendant, Dr. Domingo Sorongon, M.D., and directing the Clerk to mail a copy of this Order to the plaintiff.

October 17—(3) Summons issued. (Each served — See Returns of U.S. Marshal).

November 7—(4) Motion of Defendants and Order (Northrop, C.J.) Extending time to Answer or otherwise Plead until and including November 13, 1973. (Copies of Order mailed 11-9-73 ncw).

November 8—(5) Motion of Defendants to Dismiss, and Memorandum in Support thereof. (Copies submitted).

November 8—Status Conference held before Northrop, C.J.

1974

January 23—(6) Petition of Plaintiff for the Issuance of Deposition Subpoenaes at the Expense of the United States and Order (Northrop, C.J.) thereon.

January 24—(7) Appearance of Charles F. Morgan, Esquire as Counsel for the Plaintiff.

January 22—(8) Notice of Plaintiff to take depositions of Dene L. Lusby, James Jordan and Robert J. Lally.

January 31—(9) Motion of Defendants for Protective order, and Order (Watkins, J.) postponing the taking of depositions of Dene L. Lusby, James Jordan and Robert J. Lally to February 8, 1974.

March 11—Status Conference held before Northrop, C.J.

April 3—(10) Opposition of Plaintiff to Defendants' Motion to Dismiss.

April 4—Hearing on Motion of Defendants to Dismiss before Northrop, C.J.

April 4—Argued and held sub-curia.

April 11—(11) Supplemental Memorandum of Defendants in Support of Motion to Dismiss. (Two copies submitted).

May 17—(12) Opinion and Order (Northrop, C.J.) Granting Defendants' Motion to Dismiss. (Copies mailed to counsel 5-20-74 ncw).

May 20—(13) Judgment Dismissing Plaintiffs' Complaint, Order (Clerk) (Dated May 17, 1974) (Copies mailed to counsel 5-20-74 ncw).

May 21—(14) Notice of Appeal of Petitioner. (copies mailed by Clerk — 5-21-74).

May 22—(15) Order (Northrop, C.J.) amending Opinion dated May 17, 1974.

May 23—(16) Motion of Plaintiff and Order (Northrop, C.J.) that Official Court Reporter prepare and furnish the transcript of proceedings, as therein set forth, pursuant to U.S.C., Title 28, Section 753(f). (copy delivered to Official Court Reporter).

May 24—(17) Transcript of Proceedings before the Court (Northrop, C.J.) on April 4, 1974.

May 29—Record on Appeal transmitted to Clerk, United States Court of Appeals, Fourth Circuit, Richmond, Virginia.

1975

May 5—(18) Attested copy of Order of Judgment of the United States Court of Appeals, Fourth Circuit, reversing the Judgment of the District Court and remanding case for further proceedings, as therein set forth, and copy of Opinion.

In the United States District Court
for the District of Maryland

Complaint

Civil Action No. 8X (Civil Rights)

John Washington,
Plaintiff,
v.
Doctor Harold M. Boslow, Director Patuxent Institution, Jessup, Maryland 20794, and Doctor Domingo C. Sorongon, M.D., Patuxent Institution, Jessup, Md. 20794
Defendants.

I.

Jurisdiction

1. This is a civil action authorized by 42 U.S.C., Sec 1983 to redress the deprivation, under color of State law of rights secured by the constitution of the United States. The court has jurisdiction under 28 U.S.C. Sec. 1343. Plaintiffs seek declaratory relief pursuant to 28 U.S.C., Secs. 2201 and 2202.

II.

Plaintiff

2. Plaintiff John Washington is and was at all times mentioned herein, prisoner of the State of Maryland, in custody of the Department of Correction. He is currently confined in Patuxent Institution, Jessup Md. 20794. The plaintiff is eligible for release on parole under Maryland law at the time of the writing of this petition.

III.

Defendants

3. Defendant Harold M. Boslow is the Director of Patuxent Institution. He is legally responsible for the overall operation of said institution.
4. Defendant Domingo C. Sorongon, M.D. is the Medical Doctor at Patuxent Institution, he is legally responsible for all medical treatment in said institution.

IV.

Facts

5. In the middle of August 1972, plaintiff was in the recreation yard at the Patuxent Institution wherein he received an injury to his left side in the area of his rib cage.
6. Plaintiff complain of his injury to Domingo C. Sorongon, M.D. at the time of injury and was told by Domingo C. Sorongon that there was nothing to worry about and everything would be okay.
7. Plaintiff continued to complain about his ailment and the pain he was suffering and he continued to be refused medical help.
8. In October 1972, plaintiff was transfer to the Maryland House of Correction, Jessup, Md — per order of Judge Plummer M. Shearin of Montgomery County Circuit Court.
9. On arrival at said institution plaintiff continued to complain of his ailment and pain and he was placed on protective custody.
10. Plaintiff then sought medical treatment in the Md. House of Correction, and a Doctor Weaverman was brought to the institution to examine plaintiff.
11. X-rays were taken for the first time and it was found that plaintiff indeed had a broken rib (10th rib on left side) and this rib had healed on its own, but not in it's proper place due to neglect of Domingo C. Sorongon and the Patuxent Institution.

12. Plaintiff still has trouble and pain because of the neglect suffered under the hands of Patuxent Institution.
13. Plaintiff was returned to Patuxent Institution in July of 1973 by a ruling from The Court of Appeals on June 14, 1973. *Cash v. Director.*
14. Plaintiff still has great pain and finally Dr. Sorongon had X-Rays taken in August 1973, one year after injury was received and at this time he too noticed where the broken rib had in fact healed but stated their was nothing that he could do now.

V.

Legal Claims

15. Defendants failure to provide medical care needed by plaintiff Washington constituted cruel and unusual punishment (Eighth Amendment of the U.S. Const.) and punishment without due process of law (14th Amendment, U.S. Const.)
16. The plaintiff has no plain, adequate or complete remedy at law to redress the wrongs described herein. Plaintiff has been and will continue to be irreparably injured by the conduct of the defendants unless this court grants the declaratory and injunctive relief which plaintiff seeks.

Wherefore, plaintiff respectfully prays that this court enter judgement granting plaintiff:

1. A declaratory judgment that the defendants acts, policies, and practices described herein violate plaintiffs rights under the United States Constitution.
2. Compensatory damages in the amount of $10,000 to plaintiff Washington from all defendants and each of them.
3. Punitive damages of $10,000 to the plaintiff from defendant Boslow and defendant Sorongon.
4. Trial by jury on all issues triable by jury.
5. Plaintiff's cost of this suit.

6. Such other and further relief as this court may deem just, proper and equitable.

August 17, 1973

Respectfully submitted,
JOHN WASHINGTON,
Post Office Box #700,
Jessup, Maryland 20794.

In propria personum

In The United States District Court
for the District of Maryland

Civil Action No. 8X

John Washington, et al.,
Plaintiff,

v.

Doctor Harold M. Boslow, et al.,
Defendants.

Motion for leave to proceed in Forma Pauperis and for appointment of counsel.

Plaintiff moves this court for an order permitting him to file this action in forma pauperis without prepayment of fees and costs or security therefore, and appointing counsel to represent plaintiff as provided in 28 U.S.C. Sec. 1915 (d) and 18 U.S.C. Sec. 3006A (g), because, as their attached affidavits indicate, plaintiff is unable to pay such costs or give security therefore, and he cannot afford to employ an attorney. This motion is based on the complaint, affidivits submitted herrewith.

August 17, 1973

JOHN WASHINGTON,
Post Office Box #700,
Jessup, Maryland 20794.

In propria Personam

In The United States District Court
for the District of Maryland

Civil No. 73-1025-N

John Washington,
v.
Dr. Harold M. Boslow, Director Patuxent Institution,
and Dr. Domingo C. Sorongon, M.D.,
Patuxent Institution.

JUDGMENT

In accordance with the Opinion and Order dated May 17, 1974, filed in the above case, it is

ORDERED AND ADJUDGED:

That the plaintiff's complaint be and the same is hereby DISMISSED.

Dated at Baltimore, Maryland this 17th day of May 1974.

PAUL R. SCHLITZ,
Clerk,

By: EARL L. GRAHAM,
Deputy Clerk.

In The United States District Court
for the District Of Maryland

No. 73-1025-N Civil

John Washington,
v.
Dr. Harold M. Boslow, etc., et al.

Baltimore, Maryland
April 4, 1974

The above-entitled case came on for hearing on Motion of Defendants to dismiss before His Honor, EDWARD S. NORTHROP, Chief Judge, at 9:05 o'clock a.m.

APPEARANCES

For the Plaintiff: Charles Morgan.

For the Defendants: Donald R. Stutman.

(2) PROCEEDINGS

(The Court) Good morning.

(The Clerk) Civil Action 73-1025-N, John Washington versus Dr. Harold M. Boslow, Director, Patuxent Institution; Dr. Domingo C. Sorongon, M.D., Patuxent Institution.

Hearing on the motion of Defendants to dismiss.

Mr. Charles Morgan for the Plaintiff, and Donald R. Stutman for the Defendants.

(The Court) All right, Gentlemen, let's see, you've got some things you want to introduce, haven't you?

(Mr. Morgan) Yes, Your Honor, in opposition to the motion.

Seated at counsel table with me, by the way, Your Honor is—

(The Court) What?

(Mr. Morgan) Seated at counsel table with me, he is not a member of the Bar, and awaits results of the Bar exam.

Yes, Your Honor, in opposition to the motion, we have a number of documents and exhibits, and I think, although I haven't specifically talked to Mr. Stutman about each and every one of them, I think in general we have agreed to them and if he has any objection he can restate them, but I don't think there will be.

(The Court) Mr. Stutman?

(3) (Mr. Stutman) I don't have any objection, if we're talking about the deposition.

(The Court) Okay.

Well, then, will you please introduce them, Mr. Morgan?

(Mr. Morgan) All right, sir.

Our first exhibit, Your Honor, would be from the case of Milton McCray, McCray versus Rutherford, and this is also the case of McCray versus Burrell and McCray versus Smith, Civil Numbers 70-1409, 72-68—

(The Court) Wait a minute, start again, will you?

(Mr. Morgan) I'm sorry.

70-1409.

(The Court) Yes.

(Mr. Morgan) 72-68.

(The Court) Yes.

(Mr. Morgan) 72-69.

(The Court) Right.

(Mr. Morgan) And 72-234.

As Your Honor will recall, there were hearings on this case in June of last year, on June 11, 12, 13 and 14, and in reviewing the transcript of that entire four-day proceeding, it appeared that the entire transcript of June 11, which was the first day of the hearing, dealt with the question of the Grievance Commission, and

the exhibits that (4) were introduced by both Plaintiffs and Defendants that day, in addition to the transcript itself, I have here and we propose to introduce that as Plaintiff's Exhibit 1.

(The Court) All right.

(Mr. Morgan) In opposition to Defendant's motion to dismiss.

(The Clerk) Marked as Plaintiff's Exhibit Number 1.

(Items were marked Plaintiff's Exhibit No. 1.)

(The Court) All right.

(Mr. Morgan) Second, Your Honor, in connection with that same hearing, on June 12 there were two occasions during the course of the day when testimony was given by either McCray or by the Warden of the Penitentiary, and I think by Major Mills from the Penitentiary, concerning the Inmate Grievance Commission, and I Xeroxed copies of the relevant pages of the transcript from June 12, and would also propose to introduce that as Plaintiff's Exhibit 2.

(The Court) Very well.

(Mr. Morgan) Specifically, the pages are Pages 145 through 171, and Pages 278 through Page 291.

(The Court) All right.

(The Clerk) Marked Plaintiff's Exhibit Number 2.

(Items were marked Plaintiff's Exhibit Number 2.)

(5) (Mr. Morgan) The third item, Your Honor, is the deposition taken in this case, Washington versus Boslow, of Dene L. Lusby, on February 28th, 1974.

Mr. Lusby is the Executive Director of the Maryland Inmate Grievance Commission and I was present for the examination of Mr. Lusby and Mr. Stutman was also present for the Defendants.

In the back of this deposition are also a number of exhibits.

(The Court) Very well.

(The Clerk) Marked Plaintiff's Exhibit 3.

Do you also want this filed in the case, Mr. Morgan?

(Mr. Morgan) Yes.

(The Clerk) As a pleading?

(The Court) No.

(The Clerk) Or do you just want it as an exhibit?

(Mr. Morgan) It should be filed as an exhibit, that's right.

(The Clerk) Just as an exhibit, filed in the case?

(Mr. Morgan) Well, it's filed as Plaintiff's evidence in opposition to the Defendant's motion to dismiss.

(The Court) Yes.

(The Clerk) All right.

Plaintiff's Exhibit 3.

(Items were marked Plaintiff's (6) Exhibit Number 3.)

(Mr. Morgan) In connection with that same deposition, Your Honor, there was a question made to Mr. Lusby concerning some of the conditions of confinement at Patuxent Institution, and he said that he would supply us with copies of relevant Grievance Commission orders, he didn't have them that day, and after the deposition I wrote a letter to him on March 19th, to which he responded on March 20th and attached the two Inmate Grievance Commission orders that actually should have been exhibits to the deposition, but just simply weren't available on the day of the deposition.

(The Court) All right.

(Mr. Morgan) And so, as our next exhibit, I would propose to introduce my letter to Mr. Lusby, Mr. Lusby's letter back to me, which explains the circumstances, and also the two exhibits themselves.

(The Court) All right.

(The Clerk) Plaintiff's Exhibit Number 4.

(Items were marked Plaintiff's Exhibit Number 4.)

(Mr. Morgan) The next exhibit, Your Honor, is a deposition taken by — taken on, rather, February 28, 1974, in this case, Washington versus Boslow, of Robert J. Lally, who is the Secretary of the Department of Public Safety and Correctional Services.

(7) As with the deposition of Mr. Lusby, I was present to examine Mr. Lally and Mr. Stutman was present for the Defendants.

(The Court) Let's see, he is known as Secretary of what?

(Mr. Morgan) Secretary of Public Safety and Correctional Services.

(The Court) What? Public Safety, and what?

(Mr. Morgan) The Department of Public Safety and Correctional Services, Your Honor.

(The Court) Yes.

(The Clerk) Plaintiff's Exhibit 5.

(Item was marked Plaintiff's Exhibit No. 5.)

(Mr. Morgan) The next exhibit we would propose to introduce, Your Honor, is a series of papers, and perhaps I should describe them for the record.

First is a letter dated March 21st, 1973, to James Jordan from Robert J. Lally. Attached to that letter was an order of the Inmate Grievance Commission in the case of Curtis Midgett and Ernest Minnick and Ronald Minnick. That order of the Grievance Commission is four pages long and is dated March 7, 1973. Attached to it is a statement signed by Secretary Lally, which reads:

The order of the Inmate Grievance commission is (8) affirmed this 20th day of March, 1973.

Next, in this same group, is April—

(The Court) All right, we'll mark that 6-A, okay?

(Mr. Morgan) That would be fine, Your Honor.

(The Court) All right.

(Mr. Morgan) Six B would be, then, a letter dated April 2nd, 1973, which is a letter to Secretary Lally from James Jordan and is a three-page letter.

Six C is a letter dated April 6, 1973, to James Jordan from Secretary Lally referring to an attached revised order, and the revised order is, itself, attached.

And the final section of Exhibit 6, which I guess would be 6-D, is a letter—

(The Court) Six D?

(Mr. Morgan) Six D.

(The Court) Yes, sir.

(Mr. Morgan) Is a letter of July 16, 1973, from Secretary Lally to Curtis Midgett, referred to before, the prisoner who filed the original complaint.

(The Court) All right.

(The Clerk) Six A, B, C and D.

(Items were marked Plaintiff's Exhibits Numbers 6-A, B, C and D.)

(Mr. Morgan) The Plaintiff's final exhibit, Your Honor, is a document entitled, Affidavit of Josephine K. Gump.

(9) Miss Gump is lawyer who works at the Prisoner Systems Project and at my request she went to the Inmate Grievance Commission offices and reviewed the most recent orders of the Maryland Inmate Grievance Commission which, as Mr. Lusby explained in his deposition, are kept in a central place and kept in chronological order.

The purpose of her inspection of Grievance Commission orders was to discover first, what the average length of time it was between the filing of an order and the final disposition of — the filing of the complaint, rather, and the final disposition of the complaint by the Commission.

Second, to discover on how many occasions inmates have been represented by counsel or by law students or by fellow inmates and in how many cases they represented themselves, and this affidavit by Miss

Gump, and she's available to come and present this into evidence herself, although I don't believe it will be necessary, this affidavit of Miss Gump explains the procedure that she used to develop this information and the information itself and is signed by her and notarized.

(Mr. Stutman) I'm looking it over, Your Honor.

(The Clerk) Plaintiff's 7.

(Item was marked Plaintiff's Exhibit Number 7.)

(Mr. Morgan) I apologize to Mr. Stutman for not being (10) able to have presented this to him before, but it was typed up in final form just yesterday afternoon.

The purpose of having Miss Gump do this affidavit, rather than to have the actual orders of the Grievance Commission entered in evidence, is simply to avoid an enormous amount of paperwork, and her summary here is accurate, to my satisfaction, and is sworn to under oath by her.

(The Court) Insofar as that exhibit is concerned, do you want to keep the record open, Mr. Stutman, in reference to an independent check on that data?

(Mr. Stutman) I'm sorry, Your Honor?

(The Court) I am not in any way, Mr. Morgan—

(Mr. Morgan) I understand, sir.

(The Court) — stating that she would say anything wrong, but maybe he would want to have a run on it himself.

(Mr. Stutman) Well, I really have no objection, subject to, you know, an addition, if it proves not to be accurate, that's all.

(The Court) All right.

Okay, well, how long do you want?

(Mr. Morgan) Your Honor, I might suggest, to a certain extent, this information is public record.

(The Court) Yes.

(Mr. Morgan) And the only reason that it is presented in this form is to make it easier for the Court to be (11) able to review it.

(The Court) I understand.

(Mr. Morgan) And although it is presented in exhibit form here, I think it could be, actually, presented in memorandum form, or in our brief, if Mr. Stutman wanted to do that.

(The Court) Ahuh.

(Mr. Stutman) Well, as I said before, I really have no objection, and unless I find out something to the contrary, that these aren't all the cases, I would have no objection.

(The Court) Well, what I'm saying, of course, take it for what it's worth, but I want to know whether you want an opportunity to answer any of these things, that's all.

(Mr. Stutman) Any of the exhibits?

(The Court) Yes, by brief, or anything else you wish to do.

(Mr. Stutman) Well, the only thing I would like to do is take a closer look at this affidavit, all the other exhibits I've seen.

(The Court) All right, and then give you an opportunity to file a reply brief?

(Mr. Stutman) Yes, if it's necessary.

(The Court) All right.

Now, is that all you have?

(12) (Mr. Morgan) That's all the exhibits we have, yes, Your Honor.

(The Court) All right.

Now, what have you got, Mr. Stutman?

(Mr. Stutman) On our motion to dismiss—

(The Court) Have you got anything you wish to introduce?

(Mr. Stutman) No, sir.

(The Court) What?

(Mr. Stutman) No, sir.

(The Court) All right.

Do you want to be heard on the motion to dismiss?

(Mr. Stutman) Yes, sir.

(The Court) You both have filed briefs, right?

Have you had a chance to go over Mr. Morgan's—

(Mr. Morgan) Yes, Your Honor, we filed them.

(The Court) —opposition to your motion?

(Mr. Stutman) I didn't get it, Your Honor.

(The Court) You didn't, what?

(Mr. Morgan) It was hand delivered to Mr. Stutman's office yesterday.

(Mr. Stutman) And I wasn't in yesterday afternoon and I haven't been in the office yet this morning, so I haven't had a chance to look at it.

(The Court) So, the best thing to do is give you an (13) opportunity to reply to it?

(Mr. Stutman) I think I better have some time, yes, sir.

(The Court) Okay, I'll give you — what do you want?

I'll give you 15 days, is that enough?

(Mr. Stutman) Fine.

(The Court) All right.

Now, do you want to argue this morning on your motion to dismiss, and Mr. Morgan can argue in opposition to it, briefly, and then we can — I'll hold the matter open to give you an opportunity to reply to that brief, and in 15 days, okay?

(Mr. Stutman) Yes, sir.

(The Court) All right.

Is that all right with you, Mr. Morgan?

(Mr. Morgan) The only comment I would have about that, Your Honor, is with regard to the length of time.

As Mr. Stutman knows, Mr. McCray's case is on appeal, and as Your Honor knows, also.

(The Court) Yes.

(Mr. Morgan) We were advised that the brief for the appellant is due in that case on April 29.

(The Court) Well, do you want—

(Mr. Morgan) As I understand it, although I don't (14) know for sure, I think the case is going to be scheduled for argument the first week in June and it could possibly be scheduled for argument en banc the first week in June, and I think that it would be to the benefit of both parties were this case to be able to — the Washington case were to be able to be on appeal in time so that this information could be included in the appendix to my brief on April 29th, and also so that this evidentiary material could be referred to by both parties in their briefs, as well as oral argument.

I had previously written a letter to the Fourth Circuit asking for an extension of time on the brief in McCray, noting the fact that the Washington case was developing in the District Court and would be coming to the Fourth Circuit either on appeal of the Plaintiffs or Defendants in the near future, and I don't think that there would be any problem, at least I don't foresee any problem at this point, consolidating the two on appeal.

The only possible problem may be that the Washington case may not get to the Fourth Circuit on time.

(The Court) Well, we'll do the best we can, that's all I can say, Mr. Morgan.

Of course, you can allude to the new arguments down there, I imagine, but if we give him — how long do you need to answer this?

(Mr. Stutman) I would hope to be able to have an (15) answer drafted by the middle of next week.

(The Court) All right, then let's do that.

(Mr. Morgan) That would be fine.

(The Court) And we'll see what we can do, that's all I can tell you because I'm backed up something terrible.

(Mr. Stutman) As a practical basis — well, all right.

(The Court) Okay.

All right.

(Mr. Stutman) Just briefly, if the Court please, this case, I think, is a clear example of what the Court meant when it said that exhaustion would be required before the Grievance Commission in the McCray versus Burrell case, is a very clear example.

We have an individual who was transferred to Patuxent Institution and in his pleading alleges that he was injured in the exercise yard, I think it was, playing softball. The doctor didn't really do anything for him and he was transferred back to the Maryland House of Correction.

He says that he discovered that he had broken ribs, which he says occurred at the time of the incident at Patuxent Institution, and made his claim for denial of proper medical treatment.

Without going into the facts of the case, I think it's clear from the testimony before this Court in McCray, and (16) the Court's own opinion in McCray, that this is a matter, at least initially, to develop a factual record which could be resolved by the Inmate Grievance Commission.

I think Mr. Lusby's deposition contains references to facts that the Inmate Grievance Commission can and does on occasion take immediate action to correct violations of prisoner's civil rights, including allegations of denial of proper medical treatment, and see that the individual, even if he does have a damage action, still gets his treatment as soon as possible, and in this particular case had Mr. Washington, and I think the record before the Court again will back this up, if Mr. Washington had complained to the Grievance Commission and the Grievance Commission's investigation found out there had been denial of medical treatment, there's no question in my mind that the situation would have been rectified immediately.

And subsequent to that, after the rectification, the individual would also have had a chance to present at a hearing any allegations regarding this medical treatment, a record should have been developed, and the record could have come to this Court, if the claimant was still dissatisfied, and given the Court a basis on which to either open the case up for further information or decide it on the information before it from the Grievance Commission's record.

And, again, as I said, I'm going to be brief, this is the perfect example of an individual who makes a complaint (17) within the system that he has been denied his civil rights, an example of a situation where the Grievance Commission can be effective, as proven, I think, in Mr. Lusby's deposition and in the prior testimony before this Court, where fast relief can be obtained, a proper record prepared, and if there is, in fact, a violation of civil rights then when it finally gets to this Court on a proper record, the Court would be able to dispose of it in a similar fashion, habeas corpus, where there has been development of a state record in a state court before a state agency.

And on the very practical basis, I think, again, it points up to the propriety of this Court's prior opinion in McCray and that in very few cases would the Court be able to act as fast as the Grievence Commission, because it has the ability to facilitate treatment and rectification of problems with a phone call, whereas the petition for proper medical — containing allegations of denial of medical treatment filed in this court would have to go through a long process, if it was a question of injunctive relief or getting the man immediate medical treatment it would, of necessity, require appointment of counsel and filing the proper motion, and petitions for injunctions.

It all boils down to the fact that the cases which require exhaustion, talk about exhaustion, only require exhaustion, an effective remedy. We think the remedy is (18) effective, we think it's workable, we think it has worked and will continue to work; and we see no reason why this Court should not follow its prior opinion in

McCray and dismiss this petition and require Mr. Washington to present these grievances to the Inmate Grievance Commission.

That's all I have.

(Mr. Morgan) Your Honor, in view of the Court's previous opinion in McCray versus Burrell and Smith, Plaintiff here concedes that he has an uphill battle convincing the Court exhaustion of his state administrative remedy should not be required in this case.

However, I have submitted on behalf of the Plaintiff a memorandum in opposition to the Defendant's motion to dismiss, and, of course, the Court, although it's not in this case, has the benefit of the thoughts of both Mr. Stutman and Mr. Rosenthal and I had in our memorandum in the McCray case itself, and I don't think that our position — I think that our position, Plaintiff's position, is adequately reflected in the papers we have filed to date.

I would just say that I believe the case, this case, can be distinguishable — can be distinguished from the McCray case on the following grounds.

First, the McCray case was a typical case of a prisoner complaining about the conditions of his confinement and although he was asking for damages, as the Court noted in (19) its opinion in McCray versus Burrell, the nature of his complaints went directly to discretionary actions of the prison administrators acting in their official capacity, specifically, their discretionary action in placing him into isolation on one occasion, and into what was called hospital isolation on another occasion, and, also, the addendum alleged denials of procedural due process.

By comparison, the Washington case, although it involves a Defendant who is an employee of Patuxent Institution, is much more in the category of a traditional tort action, of course, the Supreme Court recognized in Monroe versus Pape that actions under 1983 are essentially in many ways tort actions, and this particular case presents those kinds of facts.

Mr. Washington is asking for compensation for injuries that he alleged that he suffered as a result of the grossly negligent, at least, and perhaps intentional, behavior of Dr. Sorongon and other people at Patuxent Institution in the treatment of this medical problem that he had.

We would submit that the Inmate Grievance Commission is a particularly inappropriate body to decide this case because what's at issue, really, is not anything that invokes their expertise, and their expertise being in the area of prison administration affairs.

(20) The proof in the case is the proof that is typical of a tort case and the kind of things that the courts deal with traditionally all the time and not the kind of thing that administration agencies, and particularly the Inmate Grievance Commission, is equipped to deal with.

In addition to that, I would think that Washington proceeding pro se and no right to appointed counsel before the Inmate Grievance Commission would have a difficult time proving his case inasmuch as there is no provision for prehearing discovery, there's no — there's the possibility of the Inmate Grievance Commission restricting his rights to call witnesses, or to cross-examine witnesses, there's difficulty of proof with regard to documents inasmuch as he is a prisoner and perhaps doesn't have access to documents at University Hospital, if he went there, or at the House of Correction, where he also received some medical attention.

He has difficulties in discovery, no discovery, in fact. He has difficulties of investigating the case, and difficulties at the hearing itself in presenting the case.

Finally, and, I suppose, most important in this case is that the only relief Mr. Washington is asking is compensation in the form of compensatory and punitive damages for the injuries that he suffered and for the deprivation of the constitutional rights that he suffered, and, as the Court is well aware and as Mr. Stutman would concede, (21) the Inmate Grievance Commission is powerless to award damages, even were they to find his case wholly meritorious.

So, we would say that under these circumstances, first, that the exhaustion of administrative remedies under the holdings of the Supreme Court cannot be required, recognizing, however, the prior opinion of this Court in the McCray case.

If exhaustion may be required in certain cases, we would say that this is a particularly inappropriate case for exhaustion to be required for the reasons that I've stated this morning.

(The Court) Now, let me ask you something.

Sit down, you can be seated.

There has been a trend, and I don't know how many courts are involved, but, for example, in a case like this, where the accusation is against the doctor, right, to, in some District Court, direct the Attorney General of the state to take evidence, have a hearing, take evidence.

That doesn't mean that an attorney is assigned to the complaint, but evidence is taken and the testimony of the doctor is taken and, of course, of the complaining prisoner, and on that record the District Court makes its decision as to whether or not there has been an actionable case against him.

Now, the other thing is, of course, that in courts (22) like this court, heretofore what have we done?

What we've done is file a show cause order on the Attorney General and affidavits are submitted by the doctor, by the personnel who are accused, and anyone else that happens to have anything to do with the case, and in most instances it takes an inordinate amount of time to get those things, and that is understandable for the reason that the prisons are overloaded and the staff is overworked and the physicians are attending to other matters, and, also, of course, the pressure of the ongoing case load of the court.

I notice that in your opposition, you have indicated the number of so-called civil rights cases that have been filed here in the past number of years, the open cases and the number closed, but there is still a time element in the closing of these cases, and in the time that it

takes to develop this investigative technique which I alluded to at the very commencement of my remarks, as used by some other court.

Now, referring again to that type of action where a District Court of the United States directs the Attorney General to, in effect, hold the greivance hearing and develop a record, it seems to me that it has exacerbated the friction between the administrative authorities and the prisons themselves, and, furthermore, it has caused the federal intrusion (23) into what is most distinctly a state matter, and it also, of course, takes the time of these people who are not really a hearing body, so to speak, to effect an opposition, whereas here in Maryland we do have this Grievance Commission which hears these matters, and yet that type of attempt to get at the basis of the complaint is utilized in one instance, and, again, the type that I referred to that's utilized in this court to attempt to resolve this matter on affidavits is utilized, and, thirdly, of course, we have the situation where it would be incumbent upon this Court to hold a hearing, such as we have done in the McCray case, and such as we have done in other cases, and it has been indicated that a Jury trial can be had in these instances.

Now, the thing about this that bothers this Court, and bothers a number of Courts, and, indeed, bothers most people, is that this type of relief is something that is more or less the pursuit of the needle in the haystack, and, indeed, both the habeas corpus actions and the new civil rights cases have brought about that kind of function to a federal court in the rise of the recognition of the so-called constitutional rights of prisoners and their rights to be free of the various types of things, which it, really, has brought this matter about, and brought it to the attention of the public, and others.

It's difficult to say, under the heavy pressures (24) that the Courts work under today, that they used to go into these problems and to look for that needle in the haystack. There are those who say that no matter how infinitesimal injustice is, it must be rooted out and destroyed.

I think they lose sight of the fact that whereas we attempt to do justice, we are, in essence, a court of law and we have to give priority to certain things.

We are forced to give priorities because of both the decisions of the Supreme Court and the matters that are foisted on this Court that are really legislative matters by the Congress of the United States with the result that it seems to the Court that the United States District Courts and the United States Circuit Courts of Appeal, and, more particularly, the Supreme Court of the United States, should attempt to make a workable solution to these problems in a world that, of course, is not perfect, and such a solution, I think, has been the thing that everyone seeks, it has occasioned a number of articles. Of course, in seeking a solution, we move into what you might call an area of compromise where we compromise the federalism itself, and what the states are required to do, and what the Courts of the United States are required to do in reference to the duty of those courts to see that the constitutional rights of the individual are not impinged upon by the state.

In seeking a solution, it seems to me that the (25) Grievance Commission answers the problems that we face in connection with making a determination of what grievance and what complaint these people have under the civil rights action, and that it forms a better forum to do that in than the methods that we are utilizing at the present moment.

Manifestly, if, for example, we undertook to hear and act as a Grievance Commission, in and of itself, or act as a court of law, as you point out this is a tort case and ought to be in this area, we are under the gun of people who would do nothing, and have the time to do it, to come into these courts continually.

There is no constitutional guarantee, for example, that a person in a civil suit is entitled to a lawyer, yet, and I don't know whether that time will ever come. It seems to me it shouldn't come.

You have the correlary question arising in this type of case, for example, what right does a prisoner have to

bring a tort action against another individual that arose prior to his incarceration?

Now, we have got some of those being filed in this court.

Does that mean that people in Atlanta, for example, who file a tort action against an individual in the State of Maryland which arose prior to his incarceration must be brought here at Government expense and to prosecute his case (26) in this court during the period of his incarceration?

Most every prisoner could think of some action that he could bring of some kind.

We have been forced to accept these and to file, but, as yet, we have not brought these people over.

I would refer you to the case of the so-called jumping bandit — what's the name of that case — Urbano, it was a libel suit against a magazine, he filed one here, he filed one in New York, and it was one that took a great deal of trouble and time, and so forth, and effort, and Urbano wished to come here and testify.

It's something that maybe Mr. Morgan and you, Mr. Stutman, might look up, there's an extremely interesting dissertation of the type that I alluded to where a person can cause a Court a great amount of work, and so forth, under the circumstances, which would appear unwarranted, really.

New York has a statute where a person loses his civil rights, and, also, I think that if a person is imprisoned in reference to that type of case to which I am now referring, the statutes toll, and when he comes out he can file suit again.

What I'm pointing to is this, if the latter method were pursued, and that is that anyone, any matter whatsoever, could come into this court from prison and litigate, that's all we would be doing, despite the fact that the records indicate that perhaps the cases, civil rights cases, are not (27) excessive, according to your viewpoint. They are excessive, however, Mr. Morgan, in reference to those who have to make the decision and

the weight is felt, they're a burden to all of us, and I notice that in '72, 89 cases were opened, and in '73, 97 were opened.

What I'm saying, in essence, is this, it seems to me that some screening must be had before these matters come to this Court, and that is what I said in McCray, and if the record, for example, before the Grievance Commission develops that there is an action which would warrant monetary damage, then I think that the Court would certainly take whatever steps are necessary to alleviate that condition and have the proper hearing that would be indicated under those circumstances.

Now, I point one other thing out, I'm not including this and I'm not giving any opinion, I'm merely stating this.

Another thing that has occurred particularly in reference to these suits against medical doctors by prisoners, it's very rare, it's a matter of malpractice, really, when you get right down to it, and the suits, unquestionably, have increased the cost of medical malpractice insurance. They have caused a reaction among the medical profession in reference to performing a public duty, which it certainly is, to treat these men, and it's something that would appear to me to be certainly taken into consideration when you force (28) the Court to deal, over the board, so to speak, with weighing the various rights of individuals and attempting to see that justice is done in an imperfect world.

This is giving us all some concern, this activity, and the reluctance of medical people to take on the duty of treating prisoners, under the circumstances, because no matter what they do they're going to get a complaint about it, and, in most instances, the claims, and you can look through the decisions of not only myself, but the Judges of this court, in 95 to 99 per cent of the long time we give to developing the issues, and so forth, and the affidavits of these medical men, and the rest, almost comes out — at least, in most cases, comes out that there is just absolutely nothing to it.

And I return again to the fact that in this day when we must have to work on a priority condition and make decisions of that kind that it seems to me that — and have to select priorities, it's up to the federal courts now to make a determination as to what we should do concerning this very difficult area that we have to work in.

And I will receive your brief, Mr. Stutman.

(Mr. Stutman) Yes, Your Honor.

(The Court) The middle of next week in reply to the Plaintiff's opposition to the motion and will attempt to get an opinion out as quickly as possible.

(29) All right.

Have you — I don't think there's anything else you need, you've had plenty of time with the record as it is, right?

(Mr. Morgan) I think so, Your Honor.

(The Court) All right, thank you, Gentlemen.

(Mr. Stutman) Thank you, Your Honor.

(Mr. Morgan) Thank you.

(Whereupon, hearing concluded at 9:55 o'clock a.m.)

* * * * * *

DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONAL SERVICES

March 21, 1973

Mr. James Jordan
Commissioner
Division of Correction
929 Greenmount Avenue
Baltimore, Maryland 21202

Dear Jim:

Enclosed is a copy of the Order resulting from the Inmate Grievance Commission's hearing of the complaint of Curtis Midgett, Ernest W. Minnick, and Donald Minnick. They will be sent a copy of the Order in three days.

Please let me know within thirty days in writing what specific action has been taken to comply with this Order.

Sincerely yours,

Secretary

RJL:Mcs
Enclosure

cc: Inmate Grievance Commission

STATE OF MARYLAND
INMATE GRIEVANCE COMMISSION

ORDER

In the matter of: Curtis Midgett, #57320 and IGC #1295 Ernest W. Minnick, #116732 and Ronald Minnick, #116733 and IGC #1282 Maryland Penitentiary

This matter was initiated by multiple letters of complaint addressed to the Inmate Grievance Commission by the three complainants, Curtis Midgett, Ronald Minnick and Ernest Minnick, who jointly allege that the conditions on the protective custody tier of the Maryland Penitentiary are in violation of the Inmate Rule Hankbook, that they are subjected to inhumane treatment and are the victims of racial prejudice (blacks v. whites). They request that they be granted the same privileges as inmates in the prison's general population.

The complainants appeared before the Inmate Grievance Commission at a hearing held on August 16, 1972 at the Maryland Penitentiary with Commissioners Levitt, Fulton and Bennett participaring in a unanimous decision. Ms. Josie Gump and Mr. Skip Mancuso of the Legal Aid Bureau represented the complainants. Major James Mills, Shift Commander, represented the Maryland Penitentiary.

Because these are comparison cases, heard simultaneously, a single order will issue and relate to all three complainants.

Findings of Fact

The complainants, through their legal representatives, alleged that the following conditions existed and continue to exist on the protective custody tier of the South Wing at the Maryland Penitentiary.

1. While on protective custody they are given only two showers in three weeks. Inmates in general population are given showers once a day. As relief they requested the same shower privileges i.e., daily and to be allowed to shower alone, separately from other inmates on the South Wing who are there for other than protective custody reasons.

2. The complainants claim that their visiting privileges are limited and would like to have their visits in the general visiting room of the prison, in contrast to the limited space and generally inadequate visiting room used by any inmate on the South Wing permitted visitors.

3. The complainants claim they are not allowed to exercise as required, thirty minutes a day. They claim that if they were in general population they would be getting two hours a day; but the thirty minutes of daily exercise on protective custody is not adhered to and they get their exercise at the discretion and whim of the guards.

4. The complainants would like to work while on protective custody for which they could get paid and earn industrial credits. Presently they work as volunteers and receive no money or credits. They claim they could be tier runners on the South Wing, as they would be in no danger from other inmates because those on the South Wing for disciplinary reasons are confined to their cells.

5. The complainants assert that they should not be handcuffed when they move about the institution. They state they are not on protective custody for punishment

and they urge that they should not be treated as disciplinary residents of the South Wing.

6. The complainants allege that they are not given adequate medical treatment, and that they would like to be seen by a doctor on a regular basis.

Major James Mills presented the institution's view of each issue as follows:

1. Major Mills claims that he does not have the manpower to allow the men on protective custody more than two showers a week. Consideration will be given, subject to manpower limitations, to allow protective custody inmates to shower separately.

2. Major Mills stated protective custody inmates will be allowed four visits and in the general visiting room. However, he will need an additional officer to stay with the inmate for purpose of protection and this requirement may pose a manpower problem sufficient to make it necessary to revert to use of the visiting area adjacent to the South Wing.

3. At the time of the hearing protective custody inmates were not being exercised because of the lack of manpower and as an aftermath of the July, 1972 riot. He cannot exercise all the protective custody inmates at once because all the cells would be open and security would not be maintained. However, Major Mills assured the Commission that as the situation improved, present restrictions would probably be relaxed and this would favorably affect the exercise program on the South Wing, particularly for protective custody inmates.

4. Major Mills stated that protective custody inmates do work as volunteers on the protective custody tier, but that they are not permitted on the South Wing disciplinary tiers because there are other inmates there, employed as tier runners, who could harm them.

5. Major Mills claims that the inmates are handcuffed for custody and control as well as for their own protection when moving about the institution.

6. Major Mills stated that he would see to it that the protective custody inmates received regular medical

treatment and that the South Wing medical officer would check them on a regular basis.

Conclusions

The Inmate Grievance Commission finds the grievances alleged by the Minnicks and Midgett to be meritorious in part and that certain situations and conditions do exist in the protective custody area of the South Wing that can be improved or corrected. Major Mills explained the difficult situation attendant upon the riot and its aftermath. He gave adequate justification for delays in meeting desirable goals of improvement and likewise indicated that progressive efforts were being made to attain such goals.

As to the complaints of racial prejudice by these three complainants, evidence presented by Ernest Minnick and Curtis Midgett was countered adequately by the institution's representative and this element of the complainant's stated grievance is held to be wholly without merit.

Disposition

The Inmate Grievance Commission takes note of the fact that Major Mills has initiated measures to correct the grievances stated by the complainants. However, the Inmate Grievance Commission would make the following specific recommendations and comments as to each of the stated grievances:

1. That protective custody inmates be given two showers a week and that the manpower necessary for such action be secured from among the custodial personnel. The Inmate Grievance Commission recommends that showers for protective custody inmates be given in the evening when the South Wing is relatively quiet and no disciplinary inmates are on the tiers, the "flats" or in the shower room.

2. That reasonable efforts be made to permit the protective inmates to receive visitors in the general visiting area, consistent with the need of protection that attends inmates in protective custody status.

3. That protective custody inmates should be given exercise daily within the purview of the Inmate

Handbook which states that "a reasonable amount of exercise is necessary for the health and well-being of every person".

4. That the institution consider giving protective custody inmates work assignments on the disciplinary South Wing tiers, replacing other inmates from general population.

5. The discretion of the custodial force at the Penitentiary should not be disturbed in respect of their judgment relating to "security" of protective custody inmates while moving about the institution.

6. The institution has already instituted measures to meet the expectations of adequate medical care for South Wing inmates, including regular visits to that area by staff physicians.

The claim of racial discrimination is without merit and is hereby ordered dismissed.

This 7th day of March, 1973.

E. A. FULTON,
Commissioner,
JEFFREY LEVITT,
Commissioner,
JAMES V. BENNETT,
Commissioner.

Re: Curtis Midgett #57320 IGC No. 1295
Ernest W. Minnick #116732 IGC No. 1232
Ronald Minnick #116733 IGC No. 1282

DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES

The Order of the Inmate Grievance Commission is affirmed.

This 20th day of March 1973.

ROBERT J. LALLY,
Secretary.

April 2, 1973

Secretary Robert J. Lally
Department of Public Safety and
Correctional Services
Suite 500 Executive Plaza One
Hunt Valley, Maryland 21031

Re: Curtis Midgett, #57320, IGC No. 1295
Ernest Minnick, #116732,
Ronald Minnick, #116733, IGC No. 1282

Dear Secretary Lally:

I have reviewed the Order of the Inmate Grievance Commission in the above case.

At the outset, I must again voice objection to the action of the Inmate Grievance Commission in including their general recommendations and comments in the specific inmate grievances which are sent to the inmate. Although the Commission states that these are "recommendations" and "comments", the inmate is left with the distinct impression that the institution is to take remedial action regardless of the lack of resources, etc. As an example, in the instant case, the Commission has made three recommendations which are fundamental to institutional management but which can be implemented only to the degree that money and manpower are available. We are presently operating in a deficit situation and with a shortage of personnel. Recently, the Penitentiary has been averaging 13 vacancies per month. With the City Jail's starting salary of $8,200 for Correctional Officers, and the Penitentiary's at $7,100, we can expect this average to increase.

With respect to the individual items:

1. At the present time, each inmate is allowed one shower weekly, at a time that is most feasible, i.e. during the day or in the evening, under secure conditions.
2. I have discussed this matter with Warden McClellan and he takes exception to the statement made by Major Mills in the "Findings of Fact" that the suggestion of the Inmate Grievance Commission can be carried out. If a man is in protective custody and needs the protection that that implies, the only way to afford him such protection is to have him visit in an area which can be watched closely. The segregation area is the only other area not used by inmates in the general population.
3. Inmates are exercised on a daily basis. The number exercised at any one time is determined by available staff.
4. On a limited basis, selected inmates are allowed out to help with various tasks, but this depends on their conduct, their reason for being on protective custody and the work to be performed. For the most part, the inmates on protective custody receive the basic creature comforts but the institution does not wish to encourage their stay on protective custody.
5. If by this statement the Commission is reinforcing the Officers need to use discretion in the handling and movement of the inmates, I would agree. Inmates in protective custody cannot be allowed to roam freely without protection.
6. It is my understanding that this matter has been resolved. As indicated, inmates on protective custody will receive regular medical treatment and will be checked on a regular basis.

The greater percentage of inmates are on protective custody as a result of their own machinations, i.e. gambling debts, love triangles, etc. They are free to come off protective custody whenever they choose to if they will sign a bodily injury waiver.

I respectfully request that you have the Disposition rewritten and that the suggestions, recommendations and comments of the Inmate Grievance Commission be appended to the Order and that it not be forwarded to the inmate. I feel that when the Division is doing everything possible within its present fiscal capabilities

to alleviate certain less than desirable conditions, a document such as the type covered in this letter can help to incite serious possible disturbances.

I might add, that in the light of Thursday's disturbance, the suggestions of the Commission may be further from implementation than ever.

Sincerely yours,

JAMES JORDAN,
Commissioner.

JJ:jms2

April 6, 1973

Mr. James Jordan
Commissioner
Division of Correction
920 Greenmount Avenue
Baltimore, Maryland 21202

Dear Jim:

Enclosed is a copy of the revised Order in connection with the Inmate Grievance Commission's hearing of the complaint of Curtis Midgett, Ernest Minnick, and Ronald Minnick.

Sincerely yours,

Secretary

RJL:mel
Enclosure
cc: Inmate Grievance Commission

Re: Curtis Midgett #57320	IGC No. 1295
Ernest W. Minnick #116732	IGC No. 1282
Ronald Minnick #116733	IGC No. 1282

DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES

The Order of the Inmate Grievance Commission is modified as reflected hereinafter.

The complaining inmates in this case are all on protective custody. It is within the inmates' discretion to be transferred to the general population where they could enjoy the privileges not available to them while on protective custody. While the record in this case is silent as to the reason for these three inmates being on protective custody, it is assumed that they are in this status by their own volition.

There is a positive duty on the part of the Division of Correction to protect the personal security of inmates in their custody. This is especially applicable where the threat to safety is of constitutional proportion. There exists in any correctional institution a myriad of reasons for threats to physical security of an inmate, such as personal vendettas or racial, sexual or political motivations. For these reasons, there is provided in the Penitentiary an area where such inmates, hopefully, will be secure from such threats or attacks. Since the stay of an inmate in protective custody is usually of short duration, the Division of Correction currently does not provide all of the benefits there that are available in the general population. The Capital Improvement Plans of the Division of Correction, which the current session of the General Assembly are now considering, will ultimately correct the physical limitations that now exist. In the interim, the Division of Correction is meeting its fundamental duty to provide protective security facilities to those inmates who request it.

Thus in this case, the remedy for any deprivation of benefits, such as showers, work assignments, exercise, etc. lies within the discretion of inmates, who choose to undergo the diminuition of these benefits in order to enjoy the more complete safety afforded by protective custody.

Until the physical construction of new facilities is finally completed, the Division of Correction is ordered to continue every reasonable effort to improve the physical conditions for all inmates confined to the Penitentiary.

This 20th day of March 1973

ROBERT J. LALLY,
Secretary.

July 16, 1973

Mr. Curtis Midgett #57320
Maryland Penitentiary
954 Forrest Street
Baltimore, Maryland 21202

Dear Mr. Midgett:

I wish to reply to your letter of July 3. The Order of the Inmate Grievance Commission signed by me on March 20, 1973 apparently has been misinterpreted by you.

The effect of that Order was that since you are on protective custody, you may leave this status simply by advising the authorities and signing a waiver to that effect. The decision to remain on protective custody is yours; and if you wish to enjoy the privileges of the general population, you can readily remove yourself from protective custody status.

Sincerely yours,

ROBERT J. LALLY,
Secretary.

RJL:mel

cc: Commissioner Jordan
Inmate Grievance Commission

In The United States District Court
for the District of Maryland

Civil No. 73-1025-N

John Washington,
Plaintiff,
v.
Dr. Harold M. Boslow, et al.,
Defendants.

AFFIDAVIT OF JOSEPHINE K. GUMP

STATE OF MARYLAND, CITY OF BALTIMORE, to wit:

I HEREBY CERTIFY, That on this 3rd day of April, 1974, before me, the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, personally appeared Josephine K. Gump, and made oath, in due form of law, as follows:

I JOSEPHINE K. GUMP, do solemnly swear under the penalties of perjury that the matters and facts set forth in the following statement are true and correct to the best of my knowledge, information, and belief.

1. I am a member of the Bar of the State of Maryland and the United States District Court for the District of Maryland. I am a lawyer with the Prisoner Assistance Project of the Baltimore Legal Aid Bureau, Inc.

2. On February 28, 1974, I visited the office of the Maryland Inmate Grievance Commission, Room 402, Executive Plaza One, Hunt Valley, Maryland, and inspected the written decisions of the Commission. They are maintained in four looseleaf binders and filed in the order in which they are issued. Each decision contains an introductory paragraph which states the general nature of the inmate's complaint, the date on which the case was initiated, the date of the hearing

before the Commission, and whether the inmate was represented at the hearing. Each decision also contains Findings of Fact, Conclusions, Disposition and the date of the decision. Any decision favorable to an inmate is reviewed by the Secretary of the Department of Public Safety and Correctional Services, and his signed and dated final disposition of any such cases is attached to the Commission's decision.

3. I inspected each written decision of the Inmate Grievance Commission entered between November 19, 1973, and February 20, 1974, which was the date of the most recent decision at that time. The following is a complete and accurate statement of my findings:

(Notes:

a. The "Date of Complaint" is described by the Commission in its decisions as the date on which the complaint was received (R) or the date appearing on the face of the letter of complaint itself (D);

b. The "Disposition" of the complaint by the Commission is noted below as "Meritorious" (M), "Partially Meritorious" (PM), "Not Meritorious" (NM) or "Dismissed as Moot" (DM);

c. The "Disposition by the Secretary" of cases found by the Commission to be meritorious or partially meritorious has been to "Affirm" (A), "Reverse" (R) or "Modify" (M);

d. "Week of Final Decision" is the week in which a final decision was made in each case; for example, in I.G.C. No. 1980, the complaint was received by the Commission on June 29, 1973, and a final decision was entered on February 20, 1974. The final decision was made in the 34th week after the complaint was initiated.)

I.G.C. No.	*Date of Complaint*	*Date of Hearing*	*Date of I.G.C. Decision*	*I.G.C. Disposition*	*Secretary's Disposition*	*Date of Secretary's Disposition*	*Week of Final Decision*
1980	(R) 6/29/73	9/26/73	2/20/74	NM			34th
2198	(D) 10/17/73	1/4/74	2/20/74	NM			19th
2270	(D) 11/25/73	1/25/74	2/20/74	NM			14th
2275	(R) 12/3/73	1/25/74	2/20/74	NM			12th
2106	(D) 8/31/73	1/16/74	2/20/74	DM			25th
2121	(D) 9/5/73	1/16/74	2/20/74	DM			25th
2225	(D) 10/30/73	1/18/74	2/20/74	NM			17th
2303	(R) 12/18/73	1/30/74	2/20/74	NM			10th
1742	(R) 2/7/73	4/24/73	2/20/74	NM			55th
2151	(D) 9/22/73	12/5/73	2/20/74	NM			22nd
2150	(R) 9/25/73	12/5/73	2/20/74	NM			22nd

I.G.C. No.	*Date of Complaint*	*Date of Hearing*	*Date of I.G.C. Decision*	*Date of Secretary's Disposition*	*I.G.C. Disposition*	*Secretary's Disposition*	*Week of Final Decision*
2217	(D) 10/26/73	1/4/74	2/20/74		NM		17th
1969	(D) 6/15/73	10/12/73	2/20/74		NM		36th
2220	(D) 10/27/73	1/8/74	2/20/74		NM		17th
2083	(D) 8/13/73	12/12/73	2/20/74		NM		28th
2320	(R) 1/3/74	1/30/74	2/20/74		NM		7th
1662	?	3/7/73	3/16/73		NM		N.A.
2260	(D) 11/21/73	1/18/74	2/15/74	2/20/74	M	A	14th
1905	(D) 5/15/73	8/8/73	2/15/74	2/20/74	M	M	41st
1998	(D) 6/27/73	9/26/73	2/15/74		NM		34th
2180	(D) 10/8/73	12/7/73	2/15/74		NM		19th
2179	(R) 10/12/73	12/7/73	2/15/74		NM		19th
2153	(D) 9/23/73	1/4/74	2/15/74		NM		21st
2158	(R) 9/28/73	12/14/73	2/15/74		NM		21st
2125	(D) 9/12/73	11/30/73	2/15/74		NM		23rd
2052	(R) 8/3/73	12/12/73	2/15/74		NM		29th
1962	(D) 6/19/73	10/10/73	2/15/74		NM		35th
1867	(D) 4/25/73	10/19/73	2/15/74		NM		43rd
2010	(D) 7/16/73	10/12/73	2/15/74		NM		31st
1711	(R) 1/17/73	4/25/73	1/22/74		NM		54th
1556	(R) 10/13/72	6/5/73	1/22/74		NM		67th
2066	(D) 8/7/73	12/12/73	1/22/74		NM		25th
1868	(D) 4/27/73	10/26/73	1/22/74		NM		39th
2130	(D) 9/6/73 (R) 9/18/73	12/14/73	1/22/74		NM		20th
1180	?	?	9/12/72		M		
			1/22/74	1/22/74	M	A	N.A.
2131	(R) 9/19/73	11/30/73	1/22/74	1/22/74	PM	A	18th
2145	(D) 9/20/73	11/14/73	1/14/74	1/24/74	PM		19th
1953&	?	9/11/73&	1/14/74	1/24/74	PM	M	N.A.
1941	?	11/23/73					
2185&	(D) 10/14/73	12/7/73	1/14/74	1/24/74	M	A	15th
2188	(D) 10/15/73						

I.G.C. No.	*Date of Complaint*	*Date of Hearing*	*Date of I.G.C. Decision*	*Date of Secretary's Disposition*	*I.G.C. Disposition*	*Secretary's Disposition*	*Week of Final Decision*
2075	(D) 8/5/73 (R) 8/9/73	10/26/73	1/14/74		NM		24th
1885	(D) 4/5/73	8/3/73 8/8/73	1/14/74		NM		41st
1992	?	10/24/74	1/8/74	1/21/74	PM	A	N.A.
2172	(D) 10/5/73	12/14/73	1/8/74		DM		14th
2122	(D) 10/24/73 (R) 10/30/73	12/14/73	1/8/74		NM		11th
2216	(D) 10/21/73	12/14/73	1/8/74		NM		12th
2093	(R) 8/24/73	12/12/73	1/8/74		NM		20th
2064	(D) 8/1/73	10/30/73	1/8/74		NM		23rd
2140	(D) 9/16/73	10/30/73	1/8/74		NM		17th
2135	(R) 9/19/73	11/28/73	12/21/73	1/4/74	PM	A	16th
2024	(D) 7/17/73	10/11/73	12/21/73	1/4/74	M	A	25th
1952	(D) 6/15/73	11/28/73	12/21/73	1/4/74	M	A	30th
1767& 1494	(R) 9/6/72	5/24/73	12/21/73		NM		16th
1964	(D) 6/21/73	10/3/73 11/21/73	12/21/73		NM		22nd
1886	(D) 5/11/73	10/3/73	12/21/73		NM		33rd
1850	(R) 4/18/73	9/19/73	12/21/73		DM		36th
1945	(D) 6/15/73	10/5/73	12/21/73		NM		28th
1761	(R) 2/20/73	4/25/73	12/21/73		NM		44th
1779	(R) 3/1/73	4/25/73	12/21/73		NM		43rd
2088	(D) 8/20/73	11/30/73	12/21/73		NM		17th
2124	(R) 9/17/73	11/30/73	12/21/73		NM		13th
1977	(R) 6/29/73	10/24/73	12/21/73		NM		26th
1943	(D) 6/11/73	10/5/73	12/21/73		DM		28th
1987	(D) 7/3/73	10/12/73	12/21/73		DM&NM		25th
2098& 2155	(D) 8/23/73 9/7/73	10/30/73	12/18/73		PM	A	18th
2036	(D) 7/25/73	11/7/73	12/10/73	12/19/73	PM	A	22nd

I.G.C. No.	*Date of Complaint*	*Date of Hearing*	*Date of I.G.C. Decision*	*Date of Secretary's Disposition*	*I.G.C. Disposition*	*Secretary's Disposition*	*Week of Final Decision*
2117	(D) 9/5/73	11/16/73	12/10/73	12/19/73	M	A	16th
2020	(D) 7/19/73	10/17/73	12/10/73	12/19/73	M	A	22nd
	(R) 7/23/73						
2042	(D) 7/30/73	10/17/73	12/10/73		NM		20th
2023	(R) 7/23/73	10/10/73	12/10/73		NM		21st
1973	(R) 6/27/73	9/10/73	12/10/73		NM		24th
2104	(D) 8/31/73	11/14/73	12/10/73		NM		15th
1489	(D) 8/31/72	10/26/73	12/10/73		NM		67th
2080	(D) 8/14/73	10/19/73	12/10/73		DM		17th
2147	(D) 9/23/73	11/28/73	12/10/73		NM		12th
2132& 2119	(R) 9/11/73	10/30/73	12/10/73		NM		13th
2113	(D) 9/3/73	11/16/73	12/10/73		NM		15th
2112	(D) 9/4/73	11/16/73	12/10/73		DM		15th
1936	(R) 6/6/73	9/11/73	12/4/73		NM		26th
1923	(D) 5/30/73	9/10/73	12/4/73		NM		27th
1805	(R) 3/22/73	10/3/73	12/4/73		NM		37th
1981	(D) 6/27/73	9/26/73	12/4/73		NM		23rd
1950	(D) 6/11/73	9/21/73	12/4/73		NM		26th
2105	(D) 8/28/73	11/14/73	12/4/73	12/5/73	M	A	15th
2038	(D) 7/23/73	11/7/73	12/4/73	12/5/73	M	A	20th
1971	(D) 6/26/73	10/10/73	11/29/73		NM		23rd
1932	(D) 6/1/73	9/7/73	11/29/73		NM		26th
2037	(D) 7/26/73	11/7/73	11/29/73		NM		19th
1986	(D) 7/5/73	9/10/73	11/29/73		NM		22nd
1934	(D) 6/2/73	9/10/73	11/29/73		DM		26th
2029	(D) 7/23/73	11/7/73	11/29/73		NM		19th
1951	(D) 6/13/73	10/31/73	11/29/73	12/3/73	M	A	25th
2030	(D) 7/30/73	11/7/73	11/29/73	12/3/73	M	A	23rd
2056	(D) 8/1/73	10/31/73	11/29/73	12/3/73	M	A	18th
2103	(R) 8/30/73	11/14/73	11/27/73	11/28/73	M	A	13th
2094	(R) 8/24/73	10/30/73	11/27/73	11/28/73	M	A	14th

I.G.C. No.	*Date of Complaint*	*Date of Hearing*	*Date of I.G.C. Decision*	*Date of Secretary's Disposition*	*I.G.C. Disposition*	*Secretary's Disposition*	*Week of Final Decision*
2014	(D) 7/16/73	9/28/73	11/27/73	12/3/73	M	A	21st
2022	(R) 7/23/73	9/28/73	1/27/73	11/30/73	M	A	19th
1852	(R) 4/23/73	10/3/73	11/27/73	11/28/73	M	A	32nd
2089	(D) 8/20/73	10/31/73	11/27/73	12/3/73	M	M	16th
2012	(R) 7/19/73	9/28/73	11/27/73	11/29/73	M	A	20th
1979	(D) 6/28/73	9/26/73	11/27/73	11/28/73	M	A	22nd
1461	(D) 8/15/72	10/26/73	11/27/73	11/29/73	M	A	68th
1900	5/16/73	9/7/73	11/27/73		NM		28th
2050	(R) 8/2/73	10/17/73	11/27/73		NM		17th
2071	(R) 8/13/73	10/26/73	11/27/73		NM		16th
1949	(R) 6/14/73	9/21/73	10/24/73		NM		19th
1966	(D) 6/26/73	10/24/73	11/27/73		NM		23rd
2034	(D) 7/25/73	10/19/73	11/27/73		NM		18th
2073	(R) 8/14/73	10/19/73	1/27/73		DM&NM		16th
1976	(D) 6/26/73	10/12/73	11/27/73		NM		23rd
1872	(D) 5/3/73	10/3/73	11/27/73		NM		30th
1990	(R) 7/6/73	10/10/73	11/27/73		NM		21st
1975	(D) 6/26/73	9/26/73	11/27/73		NM		23rd
1991	(D) 7/5/73	9/26/73	11/27/73		NM		21st
1959	(D) 6/18/73	10/5/73	11/27/73		NM		24th
1816	(D) 3/23/73	4/30/73	11/27/73		NM		36th
1789	(R) 3/12/73	5/16/73	11/19/73		NM		37th
2101	(D) 8/25/73	10/31/73	11/19/73	11/26/73	PM	A	14th
2086	(D) 8/17/73	10/30/73	11/19/73	11/26/73	M	A	15th
2055	(R) 8/6/73	10/19/73	11/19/73	11/26/73	M	A	17th
1862	(D) 4/21/73	9/19/73	11/19/73		NM		31st
1963	(D) 6/20/73	10/10/73	11/19/73		NM		22nd
1741	(D) 2/5/73	4/30/73	11/19/73		NM		42nd
1498	(D) 9/1/72	8/1/73	11/19/73		NM		64th
1899	(D) 5/17/73	10/24/73	11/19/73		NM		27th
1730	(D) 1/28/73	4/25/73	11/19/73		NM		43rd
1954& 2025	(D) 6/10/73	9/21/73	11/19/73		NM		24th

In addition to the foregoing information, my examination of the same decisions of the Inmate Grievance Commission also indicated that of the total of 127 cases heard by the Commission, the inmate was represented by counsel at 15 hearings, by a law student at 12 hearings, and by another inmate at 34 hearings, and the inmate represented himself at 66 hearings.

Respectfully submitted,

JOSEPHINE K. GUMP,
Josephine K. Gump,
Prisoner Assistance Project
Legal Aid Bureau, Inc.,
341 North Calvert Street,
Baltimore, Maryland 21202,
539-5340.

In the United States District Court
for the District of Maryland

Civil No. 73-1025-N

John Washington,
Plaintiff,
v.
Dr. Harold M. Boslow, et al.,
Defendants.

Deposition of DENE L. LUSBY, taken on Thursday, February 28, 1974, at 10 o'clock a.m., at Suite 420, Executive Plaza One, Hunt Valley, Maryland, before Andrew A. Castiglione, Notary Public.

Appearances:

Charles F. Morgan, Esquire
On behalf of the Plaintiff

Donald R. Stutman, Assistant Attorney General
On behalf of the Defendants

Reported by:
A. A. Castiglione

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(8) Q. Do you have any further statements of policy in addition— A. Written?

Q. Right, written. A. No.

Q. Is there any other further written rule, regulation, policy or procedure or anything of that nature that the Grievance Commission uses in its normal course of business that is not contained in those regulations? A. You said written?

Q. Written. A. No.

Q. Mr. Lusby, I would like to go through with you very briefly the procedure that is used when a complaint is received by the office from an inmate, and first, I think, we should say how is a complaint normally received and then what happens when you receive it? A. Most complaints are received in the form of letters which arrive in the mail. They are opened by the secretarial staff, docketed in various means, index cards, the docket book, two docket books, in fact. Then (9) they come to me, where I review them for purposes of determining jurisdiction and whether or not I think amicable resolution of the problem can be worked out to the inmate's advantage with the pertinent institution, whether at that immediate moment in time or in the course of the investigation that develops thereafter.

Q. And what is the next step that you would take after you do that preliminary review? A. If it can't — if the grievance cannot be informally resolved and if we have jurisdiction, a hearing is held. It is scheduled by me for the institution involved and a formal hearing is heard with a quorum of at least three of the Commissioners.

Q. Would it be fair to say then, in the case of any complaint that comes into the office or any grievance that comes into the office, it's either the subject of what I think your term is administrative dismissal — is that your term? A. Yes.

Q. Or informal disposition? A. Right.

(10) Q. Or it goes to a hearing? A. Right.

Q. There is no other possibility, is that right? A. I think your term is much better than ours, informal disposition, right.

Q. Informal disposition would be a better term? A. I think it's a better term than the one we've been operating under.

Q. The one you have been operating under is administrative disposition? A. Right.

Q. There is no other form other than those two? It is either administratively dismissed or it goes to a hearing? A. Yes.

Q. Do you know, Mr. Lusby, how the inmates in the Division of Correction and Patuxent Institution find out about the Inmate's Grievance Commission? A. Yes. They know by the grapevine, a slang term for word-of-mouth, but primarily the formal method that is used to acquaint them of the existence and (11) jurisdiction and procedures and so forth of the Commission is the inmate information sheet which is distributed to them as they pass through the reception center after having been sentenced to the custody of the Division of Correction or the Patuxent Institution, as the case may be, and they also at that time, as part of their indoctrination or orientation, whatever it might be called, the reception center at Patuxent Institution, receives a lecture about the Commission of about, as I understand it, about a half hour long.

Q. Is the lecture being delivered by institution personnel? A. Yes.

Q. How does an inmate, if you know, Mr. Lusby, find out about how to file a complaint? Apart from finding out about the existence of the Commission, how do they find out about the procedure for filing a complaint? A. That's in the inmate information sheet.

Q. That's in there also? A. And if they don't follow the rather strict outlines for the filing of a complaint set forth on that (12) sheet, it doesn't make any difference to us. We go ahead with it and develop the information that we need, anyway.

Q. Mr. Lusby, I would like to ask you some fairly specific questions about the cases that you refer to as administrative dismissals or informal dispositions. Prior to this deposition, I might state for the record, the Plaintiff filed a subpoena duces tecum to Mr. Lusby to produce at this deposition a number of the files, I believe from July of last summer, of the administrative dismissals and he was kind enough to allow me to look through those yesterday before the deposition and

because of the large number of them, I propose only to ask you questions about those which have been disposed of since the first part of December, 1973, which is a total of about 50 cases, I think.

I would like to ask you the same general question about each one of them, but before we do that, could you first tell me if the cases that have been administratively dismissed since the 1st of December, 1973 are representative of typical administrative dismissals? (13) A. I have no idea, because I did not look at that group after you left yesterday.

Q. Well— A. I will be able to answer that question after we have gone through them.

Q. Is there any reason to believe that, from this point on, there will be a change in the way administrative dismissals are dealt with? A. Oh, no.

Q. Is there any reason to believe that administrative dismissals were dealt with differently before December 1, than they were during the period after December 1? A. No.

Q. So my question, after we go through them, will be then whether this particular batch is typical of the rest. A. Right.

Q. I think probably they are in the same order that I looked through them yesterday and, if so, the one on top would be Inmate Grievance Commission Decision No. 2122. (27) five adjustment reports and five on-the-spot reports during 1973, and the additional fact that his 20-year sentence had since he was confined in the MCI been increased to a total of 40 years as a result of a subsequent rape conviction.

Q. Would this be another case then that fits into the category of the complaint appearing to be totally lacking in merit on its face? A. Yes, absolutely.

Q. Going back to that case again, Mr. Lusby, because I had the opportunity to look through these files yesterday, I need not look at it now, but I noticed in that file there was a letter from you dated February 22, 1974. I wonder if you could take a look at that letter, please. A. February 22? Yes.

Q. That was in file No. 2408. That letter, as I recall, deals with the witnesses that this person might want to have at a hearing, were a hearing to be held. A. Right.

Q. And it appears to be a statement of some policy (28) of the Commission. I was wondering if you could explain what you were telling the inmate there and whether that is a common practice or policy of the Commission? A. This is about the only one that I can remember of these in my approximately two years here. The witnesses that he requested would all have merely testified to matters that are contained in his base file, and I wrote him to that affect.

Q. Well, is it the normal practice with regard to evidence taken at Grievance Commission hearings then to not permit witnesses to testify where there are written documents available? Is that what you are saying in that letter to him? A. No, no.

Q. What are you saying? A. He had asked for about 15 or 20 witnesses, all the way from the Superintendent of the Institution down to tier officers, and the Statute and the regulations provide for a reasonable number of relevant witnesses and it was pursuant to that that I wrote this letter to him.

Q. Could I see that file? (29) A. (Handing).

Q. Well, let me ask you this, Mr. Lusby, to try to clarify this in my mind. Are you telling this guy that he can't have these witnesses at the hearing because there are too many of them or because what they are going to say is already reflected in written reports in his files or some other reason? A. No. I intended to explain to him that the things that he seemed to be concerned about bringing before the Commission would be before the Commission and that there was no need to have those particular people there because the Commission would have all of that material before it to consider it, that he need have no concern that what he wanted would not be considered by the Commission.

Q. What is the next file you have, Mr. Lusby? A. 2420, Rites.

Q. What was the disposition there? A. This file was closed after exchange of correspondence between the Secretary and me and Mr. Rites and three replies by Mr. Rites to our invitations to him to file specific grievances rather than to indicate his general (30) dissatisfaction with being at the Patuxent Institution and his failure to do so.

Q. His complaint was lacking in specificity, would you say? A. He never filed a grievance.

Q. What is in that file, then? A. What's in the file?

Q. What are the communications from him that are in the file? A. Well, he rambles about lack of rehabilitation — rehabilitation facilities. Apparently he doesn't feel that the psychiatric staff is large enough to give him the treatment that he needs.

Q. Do you see a letter in there dated February 23, from him, Mr. Lusby? It's probably the last letter received from him. A. Right.

Q. What are the grievances that he states in that letter? A. Well, he contends first that Bundy versus Cannen permits him to have his attorney at a disciplinary (31) proceeding, which is incorrect.

Q. As a matter of law, that is incorrect? A. At this time. His second item is something vaguely about censorship of outgoing mail and, of course, he is subject to the — and he cites a Texas case. He is subject to the same rules regarding outgoing and incoming mail that all other inmates are.

Q. Is that an issue that the Grievance Commission doesn't have jurisdiction to deal with? A. No, we have jurisdiction to deal with that.

Q. How is that not a complaint then? A. He says he is entitled to no censorship of outgoing mail, which is just totally without — I mean totally lacking in merit. We can call that totally lacking in merit, as we can call the first, without an attorney.

Q. What is the basis for your position that No. 2, regarding mail, is totally lacking in merit? A. He says,

"I'm to mail my letters without censorship," which is being denied him.

Q. I don't mean to argue with you, Mr. Lusby, and I'm sure you see— (32) A. Maybe I don't understand you. I don't know.

Q. I don't mean to argue with you. I'm sure you see a lot of these cases every day. What I'm getting at is if an inmate writes and says I don't think it's proper for the institution to censor my outgoing mail, which is basically what he is saying there, from what I gather from what you are reading? A. That's correct.

Q. How is that not a grievance? How is that not a complaint, because it seems to me it raises pretty substantial causes— A. Because we have heard many cases relating to mail privileges and I am familiar completely with the mail rules, and his statement that his outgoing mail is not subject to censorship is totally incorrect.

Q. You mean his outgoing mail is not subject to censorship at Patuxent, from your experience? A. It is subject to censorship.

Q. Right. And again, I don't mean to argue with you, but isn't he saying that the regulation at Patuxent is the subject of his grievance? Isn't he saying that he (33) disagrees with the Patuxent policy of censoring his mail or Patuxent's practice of censoring his mail? A. He may.

Q. How does that not raise a substantial grievance? A. He may have intended that. It's not here.

Q. Would you read exactly what it says under No. 2? A. "I'm denied 'No Censorship of Outgoing Mail' in accordance with Guajardo versus McAdams, 349 F. Supp. 211 (Southern District of Texas 1972) I am to mail my letters without censorship, which is being denied me."

Q. And that doesn't state a claim? That is wholly lacking on its face? A. Yes.

Q. And your decision that that claim is wholly lacking on its face is based on what? A. Based on

prior decisions of the Commission and knowledge of institutional rules.

Q. Now, that's two things. First you are saying, I think, that the Commission has already had this issue before it and has ruled on it? A. Stare decisis, if you wish.

(34) Q. Then the second reason, really, is unnecessary, I suppose, in light of the first reason, but what is the second reason? You said something about Patuxent's policy or Patuxent's regulations? A. The same thing. I guess I was saying the same thing different ways.

Q. Then the reason the complaint was denied, with regard to No. 2, at least, is not so much because it wasn't specific, but because the complaint had already been raised by another Patuxent inmate, had been ruled upon by the Commission and relief had been denied, is that right? A. I would say it's both, but the second that you have just developed is based on — is 90 percent based upon what you have said and what is not contained in any of his letters to the Commission.

Q. All right. What other complaints, if any, did he raise in that letter besides those two? A. That his punishment is disproportionate to his offense.

Q. That is No. 3. That is all there is to No. 3? (35) A. Do you want me to read the whole thing?

Q. It's a little difficult — you're right, that is nonspecific. A. "In accordance with Wright versus McMann, 460 E.2nd 126 (2nd Cir. 1972) 'No punishment disproportionate to the offense (and therefore cruel and unusual).' I was put into a cell with no bed, blanket, sheet — just a sink and toilet and I had all clothes taken from me."

Now, as a result of experience, what he means by that is that he was thrown into the hole for a brief period of time as a result of something that he did that caused the administration to think that he needed a cooling-off period.

Q. Does that raise — that again doesn't raise a substantial question for the Grievance Commission? It

certainly isn't lacking in specificity. A. It isn't? It is to me.

Q. You just related exactly what happened to him. He was thrown into the hole. A. All he is saying here is that he was thrown in the hole and that is punishment disproportionate to the (35A) offense.

Q. And your position upon reading that is that simply is not punishment disproportionate to the offense?

(Mr. Stutman) One must know what the offense is.

(The Witness) That's right. I don't know what the guy is talking about.

Q. That's what I'm getting at, Mr. Lusby. I don't mean to spend so much time on this particular case, but now that this comes up, I'm wondering why this man didn't have a hearing? A. We tried three times to get him to tell us and this is the type of thing that we get.

Q. Well, this letter that you are reading now is his most recent letter, is that right? A. That's right.

Q. And his third allegation, as I understand from what you read, is that he was placed into what you referred to as the hole, I think he said isolation, for an unspecified period of time. A. And I imagine he's on M-1 now, administrative segregation.

(36) Q. Was this case investigated? Is there anything in the file that indicates it was investigated? A. No, because I don't consider he ever filed a specific grievance.

Q. Has the question of being put in isolation at Patuxent ever been litigated before the Commission? A. Just the mere placing of a person in isolation?

Q. Yes. A. No. The question has arisen several times as to whether it was proper in the circumstances for that patient. You see, what I'm trying to get across to you, if he would say something like that, then we've got a grievance.

Q. Well, is the complaint that you received from him so much different from the complaints you normally receive from inmates? A. Yes.

Q. In what respect? A. They usually tell me what's bothering them and what they want done about it, what they think the administration or the institution has done wrong and what they want (37) done about it. This guy never tells me.

Q. Well, in the normal course of affairs, the Inmate Grievance Commission investigates complaints that come into the office, is that right, most complaints? A. Right.

Q. And again, I don't mean to argue with you about this case, but it appears to me — let me ask you in the form of a question. Doesn't it appear to you now, looking back at this file, at least No. 3, we talked about No. 1 and No. 2, but at least grievance No. 3 is a substantial question? Although admittedly it's not pleaded with the greatest degree of specificity, he does plead that he was placed into isolation under rather serious conditions of confinement, and he is raising the question of whether that punishment was disaproportionate to whatever offense he was put in there for, and my question is, isn't that an issue that the Grievance Commission can deal with? A. What you have stated is an issue that the Inmate Grievance Commission can deal with.

Q. Isn't that what is in the letter? A. All I can say, Mr. Morgan, is maybe he's trying (38) to say that, but he doesn't say it.

Q. Are there any other complaints raised in that letter besides those three, Mr. Lusby? A. "Decent conditions in solitary confinement."

Q. Is that a quote— A. By that—

Q. Is this point No. 4? A. Yes.

Q. Maybe you could read point No. 4? A. "In accordance with Landman versus Poyster, 333 F. Supp. 621 (E.D. Va. 1971). I am allowed 'decent conditions in solitary confinement,' which was denied me."

What he is saying there is he doesn't like the fact — he doesn't like the conditions on administrative segregation. Once again, we have heard many specific cases with regard to administrative segregation.

Q. Does he use the term there administrative segregation? A. No.

Q. He uses the term solitary confinement? A. Yes.

(39) Q. From your experience at Patuxent, there is a difference between solitary confinement and administrative segregation, isn't there? A. He's talking about segregation, I would say.

Q. Well, it's possible— A. Once again, we're talking about this vague thing, you know. You are asking me to give answers and I've got to — I'm trying to imagine what it is and, as a result of my experience, I think he's talking about M-1, administrative segregation.

Q. And that is commonly referred to as solitary confinement? A. Yes.

Q. It is? A. Yes.

Q. All right. With regard to point No. 4, what you are saying is that the complaint was dismissed, if I read correctly what your answer was, the complaint was dismissed because the conditions of administrative segregation at Patuxent have already been raised before the Commission and the Commission has already issued a (40) ruling on those conditions? A. Yes, several.

Q. Is there anything else in the complaint other than those four point? A. One more.

Q. And what does that say? A. "In accordance with Gates versus Collier, 349 F. Supp. 881 (N.D. Miss. 1972). I am allowed 'decent conditions throughout prison, living conditions, medical care, rehabilitation programs, protection from attack by other inmates, et cetera.' I am being denied proper and sufficient medical care, I am being denied entrance into rehabilitation programs and certain decent living conditions are denied me."

Q. That is clearly non-specific, right? A. That is what led me to my final disposition of this matter as it stands now, because he may come back and say he doesn't agree and he wants a hearing, in which case we will give him a hearing and bring him in and ask him what he's talking about and so forth, and maybe he'll say something that constitutes a grievance, and it's (41) very clear in No. 5, which I just read you word for word, that he doesn't like being in the Patuxent Institution. That's his grievance, he doesn't like being in the Patuxent Institution.

Q. Mr. Lusby, before we leave this case, I think for the record, since we referred to the letter rather extensively, would you just mind starting at the beginning and reading that letter from the inmate into the record in its entirety? I think we took parts out of it.

(Mr. Stutman) Why don't we Xerox it and put it in?

(Mr. Morgan) All right, we'll Xerox it and make it Plaintiff's Exhibit No. 2.

(Letter to Mr. Dene Lusby from inmate Leo John Rites citing grievances at Patuxent Institution, dated February 26, 1974, was then marked Plaintiff's Exhibit No. 2.)

(The Witness) 2423, Wagener.

Q. What happened in that case? A. Informal resolution.

Q. And what was the basis for that?

* * * * * *

(75) * * * Grievance Commission?

Q. No. Are the files that we've gone through typical of the administrative dismissals of the Inmate Grievance Commission? A. Yes, they are a representative sample.

Q. Fine. Just a couple of other questions about these administrative dismissals, Mr. Lusby. First of all, does anyone else — is anyone else in the office besides yourself involved in the decision making process with

regard to the administrative dismissals? A. On rare occasions, I consult with one or more Commissioners, if I consider a situation perhaps borderline, but not very often.

Q. Do the Commissioners or anyone else review your decisions after they are made, with regard to administrative dismissals? A. As a matter of routine?

Q. Right. A. No.

Q. No? A. No.

(76) Q. Is there anyone else in the office besides yourself who— A. Incidentally, that is one of my statutory functions.

Q. Right, I know. Is there anyone else in the office who has anything at all to do with administrative dismissals, besides yourself, and whatever clerical work is necessary to process them? A. Not unless I consult with them, on my initiative.

Q. Is the investigation that is done with regard to administrative dismissals done by you or is it done by anyone else? A. It's occasionally done by Mr. Wolf or Mrs. Kaufman, if it consists of something like a phone call or asking someone something at an institution where Mr. Wolf may be going for a hearing.

Q. You mentioned during the course of your testimony about the administrative dismissals, Mr. Lusby, two cases concerning Patuxent Institution or perhaps the Division of Correction generally, and they had to do with decisions the Grievance Commission had made with (77) regard to mail and also with regard to the administrative segregation tier at Patuxent, and I'm wondering if it's possible for us to put those two decisions or more into the record at this deposition? I guess the preliminary inquiry is do you know specifically which ones they were? A. I'd have to search to find them.

Q. Is that a possibility for us? A. You want the administrative segregation at Patuxent and what was the other?

Q. I want whatever you were referring to when we were discussing the Rites case. You were saying with regard to his complaint about mail and his complaint about administrative jurisdiction, as I understood it, those two issues had already been resolved by the Inmate Grievance Commission in other cases and there was no reason to resolve it in his case and what I would like for the record are those decisions. A. All right.

Q. I would appreciate it if you would be able to supply those for us. A. All right.

(78) Q. Mr. Lusby, concerning the cases which are not administrative dismissals, those cases which go to a hearing, how are hearing dates set by the Commission? A. I schedule the hearing dates on a first-in, first-out basis.

Q. First-in, first-out, referring to the complaint received? A. Received, right.

Q. Do you have hearings at certain institutions at certain times or do you wait until you get a group of complaints that are ready to be heard at a certain institution and then schedule a hearing or— A. The latter.

Q. Or— A. That's how it's done, the latter.

Q. You wait until you get a group? A. It doesn't require a wait. We're currently hearing six grievances per session and there are always many more than six there in the files ready to be scheduled, and I take the earliest six and schedule them.

Q. That's where the first-in, first-out comes? (79) A. Right.

Q. Although you may not have the answer to this question at your fingertips, I think probably you will be able to supply it before we finish the deposition and that is, during the past, say 120 days, could you tell us at which institutions hearings have been held and on which dates they were held and how many cases were heard on each one of those dates.

While we are waiting for the answer to that question, let me ask you a couple of others. Are there any

exceptions ever made to really what I think you described as a dual procedure, the first-in, first-out, and second, the accumulation of cases for a certain institution and then the holding of hearings; is there any exception to that dual procedure? A. I will occasionally assign priority to a case and have it set earlier than grievances that have been received prior in time, if you are talking about that.

Q. Right. In other words, that would be an exception to the first-in, first-out rule? A. Yes.

(80) Q. Are there any exceptions to the rule or procedure of practice that you wait until you get a group of grievances and then go to an institution and hear the cases all together? As an example, I will state for the record that you have a frown on your face in connection with that question, so I'll— A. I'm not sure I really get the question.

Q. I'll try to clarify that. My question is, by way of example, do you ever see a case which requires a particularly urgent disposition and have the Commissioners go to an institution to hear that one specific case, completely out of turn with regard to when they would normally go to that institution and also out of turn with regard to when that case would normally come up in the first-in, first-out system? A. No. No. Because we have on a few occasions assumed that we had jurisdiction to issue interim orders, in effect, granting injunctive relief until such time as we adjudicated the matter.

Q. And that would be — an interim order would be issued without a hearing? (81) A. Yes.

Q. You testified, I believe, in the McCray case, that that had been done on one occasion up to that time and I think that was a case called Bradley or Brady at Patuxent? A. That was Bradley, the long visit case and it was also done in the case of Joseph Wallace, a medical treatment case.

Q. Any others? I think you testified— A. They are the only two, I'm sure.

Q. You testified about Arthur Middleton, in the McCray case. A. Was there an interim order there?

Q. I'm asking you if there was. A. I don't think so.

Q. I think — I know, as a matter of fact, that the subpoena duces tecum asked you to bring to this deposition the files of James Brady, Arthur Middleton, and Joseph Wallace, and I think they are there on the table, and I would appreciate it if you would look into each file and state for the record the relevant dates. (82) A. Of what?

Q. Specifically, when the complaint was received, the date of any interim order without a hearing, the date of any hearings and the date of any final orders. A. Middleton, 1272, complaint received April 11, 1972. I see nothing about an interim order. What was the last date you wanted? What other dates do you want?

Q. There was no interim order? A. I don't see one.

Q. All right. And the date of the hearing in that case was what? A. June 30, 1972.

Q. And what was the date of the final order issued in the case? A. Of course, as you know, this has been appealed up and down a few times.

Q. I didn't know that. Just state— A. You want our first order?

Q. Yes, maybe you better state, since there have been appeals, all of the dates and what has occurred since the first order was issued. (83) A. All right. The first order was July 19, '72.

Q. Then what happened? A. You may have asked me about the wrong Middleton case.

Q. In all fairness to me, I didn't ask you about the Middleton case—

(Mr. Stutman) On the subpoena, there are two numbers, 1272 and 1444, regarding Middleton.

(The Witness) I only have 1272, and we're talking about 1444, and 1444 is in the custody and possession of an Assistant Attorney General, Henry J. Frankel, because it's on appeal. Now, I can go to the docket

entries and tell you about that. This isn't what you are looking for. 1272 doesn't bear any resemblance at all to the things you are talking about.

Q. 1444 is also Arthur Middleton, right?

(Mr. Stutman) Right.

Q. Now, Mr. Lusby, as I understand it, you are about to give us some information for the record concerning the case of Arthur Middleton's grievance, on Grievance Commission 1444, is that correct? (84) A. On the basis of our docket book.

Q. What you have in your lap is the Inmate Grievance Commission docket book? A. Yes.

Q. You are going to read from it? A. The complaint was received on August 14, 1972. November 1, the hearing was held at the House of Correction, with the Commission's order issued November 30, 1972, finding the complaint without merit. On December 12, I got a letter from Middleton asking about appeal procedures and I informed him.

Q. All right. I think we can probably— A. On January 2, he appealed. On January 3, everything was forwarded to Mr. Frankel.

Q. Excuse me, Mr. Lusby, I think we can probably stop there because the only subject of my inquiry is the interim order and, from what I understand you to say, there was no interim order issued in that case, is that right? A. No.

Q. Have there been, to your knowledge, any other (85) Middleton cases to which you may have been referring in your testimony in the McCray case? A. I don't remember that. I wish I could see it.

Q. You don't recall that testimony? A. No. Do you have it with you?

(Mr. Stutman) Is that the long visit case you are talking about?

(Mr. Morgan) No, we're talking about the Arthur Middleton cases.

Q. Do you have your cases listed anywhere by alphabetical order? Perhaps we could check there and see if there is another Middleton case.

Now, have you got the file on the Bradley case, Mr. Lusby? A. Yes.

Q. What is the number of that Inmate Grievance Commission case and what is the name of the complainant? A. 1383, James Bradley, et al.

Q. Now, in this case, you are not reading from the docket book? You are reading from the file itself, is that correct? (86) A. Right.

Q. That's James Bradley? A. Right.

Q. Now, could you state for the record, Mr. Lusby, what happened in that case as far as when the complaint was received, the date of an interim order and the date of any hearings and the date of any final order? A. The grievance was received here on July 11, 1972. On July 11, '72, we issued an interim order staying the institution's suspension of long visits at the Patuxent Institution until such time as we heard the grievance and issued our order.

Q. And was there ever a hearing held in that case? A. There was never a hearing held because fall came and long visit time passed and the institution wished not to pursue it.

Q. Was there ever a final order issued in the case? A. Yes, September 22, 1972. There was a hearing held on August 7.

Q. August 7? (87) A. August 7.

Q. Of '72? A. Right. The order was issued on September 22, '72.

Q. That would be the final order, is that right? A. Right.

Q. Now, just so I've got it straight, Mr. Lusby, the complaint was received by you on July 11, '72, and the interim order was issued on the same day, July 11, '72? A. Right.

Q. And, obviously, without a hearing of any kind? A. Right.

Q. Now, could we turn to the Joseph Wallace file? Well, why don't we get to Middleton now? A. No interim orders in any Middleton cases.

Q. What was that you were just looking at, Mr. Lusby? A. Index cards.

Q. And do they indicate that there are no other Middleton cases besides the two we have just discussed? (88) A. Yes, no others.

Q. Could we turn to Joseph Wallace? I believe you have his file there, is that right? A. Yes.

Q. What is the number of his case before the Commission? A. 1521.

Q. Now, could you give us the dates again of the relevant information there, the date the complaint was received, the date an interim order was issued and the date of any hearings held in the case? A. Complaint received September 25, 1972. Hearing held November 29, 1972. Hearing continued on December 13, 1972. December 4, 1972, issuance of interim order.

Q. December 4? A. December 4, ordering Mr. Wallace to be taken to University Hospital for appropriate examination.

Q. Was there a final order in the case, as well? A. Order issued April 26, '73.

Q. Were there any other hearings or orders issued in that case? (89) A. No.

Q. And Wallace's complaint was— A. Inadequate medical treatment.

Q. And his present need— A. For gunshot wounds received while out on escape during a crap game.

Q. His complaint was his present need for medical treatment and that was the need for the order for him to go to the hospital? A. Right.

Q. Now, as I understnad from what you say, unlike in the Bradley case, where the interim order was issued in the absence of a hearing, in this case the interim

order was issued after the first hearing but before the second hearing? A. Right.

Q. And the interim order was issued on December 4, '72, and the complaint was received on September 25, '72, is that right? A. If that's what I said.

Q. I wrote those down and I want to check that, (90) because those dates are important. A. Right.

Q. Getting back to the procedure that you go through in preparing a case for a hearing, Mr. Lusby, prior to the time that the case is actually heard by the Commissioners, what contacts either by telephone or by correspondence or personal contacts do you typically have with the people who are complained against by the prisoner, loosely, the Defendants, people in the institution are the subject of the complaint? A. The specific individuals?

Q. Either the specific individuals or their employers or supervisor or anyone who could roughly be termed on the Defendant's side of the case. A. Rarely, if ever, with the specific individual, when a specific individual is named, which isn't that often. Ninety to ninety-five percent of the time, contact is with an institutional representative who has been assigned for these purposes to act as liaison with the Commission.

Q. Does each institution have one of those? (91) A. Yes.

Q. And, as I see it or as I understand it, your usual procedure would then be, upon receipt of a grievance and recognizing it as one that was going to go for a hearing, you would get in contact either by mail or over the phone, I assume, with an institutional representative and ask him or tell him to do what? A. Either furnish appropriate records and/or look into and advise, when I think that the institution's awareness of the situation will result in it being corrected.

Q. Without the need for a hearing, you mean? A. Right.

Q. Would you typically tell the institutional representative to talk to the person, if there is a person named as the Defendant, talk to that person? A. Never.

Q. Do you have any personal knowledge as to whether the institutional representative does in fact talk to that person? A. I have no personal knowledge, no.

(92) Q. Have you ever received back, in addition to institutional records, a statement from the institutional representative to the effect that, "I have talked with the guard being named here and his statement to me is as follows"? A. Oh, yes.

Q. Well, then there is some indication that the institutional representative does talk to the Defendant specifically about the case and then relays that information back to you? A. From time to time.

Q. Does this contact that you have with the institutional representative occur in every case that goes to a hearing? A. I think so.

Q. Is there any other role the institutional representative plays besides sending you whatever documents the institution might have and sending you whatever statement he might have, from the point of view of the Defendant? A. He's also the person who presents the (93) institution's position to the Commission at the hearing.

Q. Before the hearing itself, does he have any other functions, besides those two, that you are aware of? A. I don't think so.

Q. Does the institutional representative, by way of example, to your knowledge, contact the complaining inmate in the case prior to the hearing? A. No.

Q. Has there ever been a case that you know of where he has done that? A. I can't cite you a specific case, but there have been a small number where once the institution received the synopsis letter telling them that the following cases are to be heard by the Commission at your institution on such and such a date and the synopsis of what the grievance is about, that they will contact the inmate and say, why didn't you just come to us instead of hauling off and filing a grievance, and that is very often when they are withdrawn. That will happen very often at Patuxent, for example. The

patient hauls off and (94) files a grievance and he has never said anything to anybody, to his social worker or anybody, about what is bothering him, and the first time the institution learns about it is when they get my synopsis letter, and sometimes then they go to him and say, why didn't you tell us that was bothering you, and quite often work it out. A lot of these things are caused by failure to communicate.

Q. I'm sure they are. Does anyone from the Inmate Grievance Commission prior to the hearing contact the complaining inmate personally? A. Extremely rarely. There was a time when we did it in every case. When I first became Executive Director, that was the practice and it was being done by a college student who was serving as investigator, under the title of investigator, and it became quickly apparent to me that the issues were becoming obfuscated rather than clarified, which was the intent behind the contact and that it was much more often than not disruptive rather than productive regarding the Commission's procedures, and it stopped after a few months of my becoming the Executive Director and has not been resumed.

(95) Q. What was your experience with regard to the process of having the investigator talk to the inmate before the hearing tended to obfuscate the issue and what is your experience with regard to how that was disruptive? A. Because things got way off track from what the grievance was. As it is now, the inmate comes into the hearing and then discusses his grievance with the Commissioners. Beforehand, when he was talking with the investigator and then later with the Commission, either the grievance had changed entirely in nature or things had been added or deleted and it was just a confusing condition.

Q. Could that condition— A. For the reason that in talking with the investigator, he thought of other things, he forgot some. It's much more orderly to go on the grievance, have the grievance held and if he brings up something additional at the hearing at the institution, in all fairness, because we have to be impartial, it's not prepared to respond to it at the time, then we tell

him to file a grievance on that subject and we have another hearing at (96) sometime in the future on that grievance.

Q. Let me ask you this. Assuming your investigator could discipline himself to get information only about the specific grievance and during his conversation inform the person that only that was the information that he was getting, do you think that that would be a valuable addition to the Commission or do you think that there is no need to contact the inmate except through your formal letters before the hearing? A. I think you got the wrong impression from my answer. The situation did not occur as a result of any shortcoming on the part of the investigator. It was a result of the inmate using the safety valve mechanism that the Commission represents for the first time and so many things flowing out of his head that were bothering him, that it was impossible for the investigator to contain, to restrict the interview to the grievance that had been filed. In fact, to have tried to do so would have given the inmate the impression that he was just dealing with another state tool that didn't want to hear about his problems and that sort of thing, which (97) we definitely don't want to do.

Q. Well, before the hearing, in addition to the complaint you receive from the inmate, and I think you testified either here or in the other case, the McCray case, that you send him a letter and indicate he should send back to you a list of what witnesses he wants at the hearing and any letters that he may send to you between the time he sends the first complaint and the hearing itself, do you receive any other information from him, either through letters where you may solicit specific information as an investigator, or a telephone call or personal contact of any kind? A. Both. It's not at all unusual to receive follow-up letters, solicited or unsolicited, from the complaining inmate containing additional information.

Q. Why would you typically solicit a follow-up letter? A. No, I said it's not at all unusual to receive, whether solicited or unsolicited, follow-up letters.

Q. If you receive a letter that is unsolicited, obviously you can't speak for why it was sent? (98) A. Right.

Q. If you receive one that was solicited by you, why was the letter sent by you, typically? A. To gain information that was necessary for the Commission to be properly prepared to conduct a hearing and for the institution to have a fair opportunity to present its position.

Q. And it's been your experience then, to solicit the information, a letter is more satisfactory rather than having an investigator go and solicit the information? A. One-hundred percent.

Q. Is there any information — well, the information that comes from the inmate and the information that comes from the institution prior to the hearing, and I think we've discussed it all on both sides at this point, is that right, in general terms, at least? A. Do you want to read it back?

Q. You don't have to read it back. A. Since I was just asked to agree to something.

Q. I won't ask you to agree to anything, Mr. (99) Lusby. I'll rephrase the question. You testified to information that you received from the institutional representative which comes in the form of copies of documents to the institution and sometimes in statements from the Defendant in the case. A. Informative letters and telephone calls from the institution and so forth.

Q. Any information the institutional representative seeks to have you have? A. Right.

Q. You also testified, from the inmate's side, you get his complaint, you get his list of witnesses and a letter from him occasionally which may be solicited or unsolicited. You don't get that in every case, as I understand? A. Right.

Q. Is there any other information you receive before a hearing besides those two general categories of information? A. I can't think of any.

Q. What happens to that information prior to (100) the hearing? A. It goes into the file.

Q. Into the file in the case? A. Yes.

Q. And that file is at the hearing, I assume? A. Of course, yes.

Q. What happens to the file between the time — well, you hold the file until it's complete, I assume? A. Yes.

Q. And then you give it to whom? A. Well, Mr. Wolf now carries the files to the hearing and brings them back.

Q. Do the Commissioners see the file before the hearing, typically? A. Yes.

Q. Do they see it before the date of the hearing, typically? A. Yes.

Q. How do they see it? A. How do they see it? They look at it.

Q. How do they see it, under what circumstances? (101) You testified you hold it until you give it to Mr. Wolf who takes it to the hearing? A. Yes.

Q. My question is when do the Commissioners see it, except at the hearing or just before the hearing? A. Well, it's here all the time. The Commissioners are in and out.

Q. That's my question. Do the Commissioners look at the file prior to the hearing while it's in the office in the process of being compiled? A. From time to time.

Q. Do you set hearing dates, by the way, when the file is completed or do you set the hearing date and then try to work the file to be completed by that hearing date? A. After it's completed. When it's ready to be set. When it's ready.

Q. In other words, the time the hearing is set is related then to when the file is completed? A. That's right.

Q. And the hearing date won't be set until the (102) file was complete? A. Correct.

Q. Now, when the file is completed, there is obviously a period of time between that day and the day of the hearing, right? A. Correct.

Q. Now, where is the file during that period of time? A. In the file cabinets in the next office.

Q. And the Commissioners would have access to that during that time? A. Right.

Q. And then Mr. Wolf would take the file to the hearing the day of the hearing? A. Right.

Q. Now, is there any other information that would go in the file at any point during this whole procedure that we've discussed up to the day of the hearing, besides the stuff that you would put in? A. No, I don't think so.

(103) Q. No? A. I can't think of anything.

(Mr. Morgan) Off the record

(Discussion held off the record.)

Q. All right, Mr. Lusby, one other question about pre-hearing procedure, and that is this. As I understand it, the inmate is informed that his case will be heard before the Commission and he's told that he is to send a list of witnesses. Does the inmate prior to the hearing receive from the Commission any statement of the procedures that are to be followed at the Commission hearing— A. I'm lost. I'm sorry.

Q. Let me rephrase the question. Let the record show Mr. Jordan stuck his head in the door and interrupted.

The question is this. When an inmate is informed that he's going to have a hearing before the Grievance Commission, does the Commission routinely send him or otherwise inform him of what the procedure will be before the Commission, specifically with regard to witnesses, his rights with regard to cross-examination, (104) his rights with regard to counsel, how the evidence will be considered and any other procedures that will take place at the Commission? A. Yes.

Q. And also any other rights that he may have as a litigant before the Commission? A. Yes. He receives a notification letter which contains all of that.

Q. And you have one of those? A. Several.

Q. All right, you have handed me, Mr. Lusby, what you refer to as a notification letter, correct? A. Correct.

(Mr. Morgan) We would like to introduce this, if there is no objection, Mr. Stutman, as Plaintiff's Exhibit No. 4.

(Mr. Stutman) No objection.

(Notification letter sent to inmates from the Commission was then marked as Plaintiff's Exhibit No. 4.)

Q. Let me just ask you two other questions, Mr. Lusby, about pre-hearing matters. First of all, in the (105) Statute, the Inmate Grievance Committee Statute or in the Inmate Grievance Commission regulations which are in evidence here today, is there any provision for any prehearing discovery on the part of the inmate? A. No.

Q. Again, Mr. Lusby, before hearings— A. Let me amplify on that a bit. That does not mean that I do not from time to time, when I consider it in the inmate's interest, in order that the Commission fairly decide the matter, accumulate for the purpose of the Commission's decision such information as documentary evidence as I consider necessary on the inmate's behalf. In other words, when I got — when I'm pulling it together, I pull it together from the inmate's side and the institution's side.

Q. Well, now that you have chosen to amplify, maybe you better amplify— A. But there is nothing in the Statute or regulation. The Statute does not provide for discovery procedures.

Q. And what you are saying is, I think, and correct (106) me if I'm wrong, what you are saying is occasionally, in order for there to be a fair hearing, it's necessary for you to gather information which relates to the Plaintiff's side of the case, right? A. Yes.

Q. Now, you testified that before the hearing you may talk to the institutional representative or write to him and you may write to the inmate. Is there typically

anybody else that you would contact, either over the telephone or in correspondence before a hearing, and by way of example, I would suggest a witness or somebody at the institution other than an institutional representative, some other inmate, any other third party that you could think of that you would— A. An inmate representative is notified.

Q. How is he notified? A. He receives a copy of the notification letter.

Q. The same notification letter that is Plaintiff's Exhibit No. 4? A. No. 4, right. I receive calls from many witnesses.

(107) Q. Inmate witnesses? A. A couple of times. I don't know where they got a telephone. Mostly from witnesses that the inmate has requested and I passed that information along in the synopsis letter to the institution and the liaison man at the institution has notified the witnesses and they either don't want to appear or don't know what it's about and don't want to know what it's about.

Q. And these people you talk to, potential witnesses, are typically institutional personnel as opposed to inmates? A. Sometimes they are institution personnel, not inmates, because they don't have access to phones. I get letters from some of them saying they don't wish to appear for the inmate.

Q. Right. A. And doctors, physicians, nurses, lawyers.

Q. I don't have any further questions, Mr. Lusby, about pre-hearing procedure, except one, and that is the one we have to come back to.

(108) During the past 120 days, could you tell us how— A. I don't have a Julian calendar. Can you tell me a specific date?

Q. 120 days back? A. Yes. Do you want December 1, or what, November 1?

Q. What is the most recent date that you have? A. The most recent?

Q. Yes. A. Are you talking about that have been heard or have been scheduled?

Q. That have been heard. A. February 27, 1974.

Q. Why don't you do it, then, from October 1 to the present? A. Are we going to need the docket book any longer?

Q. I don't think so. A. Where do you want to go from?

Q. October 1 to the present. (109) A. You want the date and the number—

Q. From October 1 to the present, what I want to know is at what institutions hearings were held and on what dates and, if your records reflect it, how many cases were heard on a particular date, on each of those dates? A. How many were scheduled and how many were heard?

Q. How many were heard. A. You want to know how many were heard on what date from October 1 to now?

Q. Yes. A. October 3, 1973, 5 at the Penitentiary; October 5, 5 at the Penitentiary; October 10, Penitentiary, 5; October 12, Penitentiary, 5; October 17, at the House of Correction, 5; October 19, at the House of Correction, 5; October 24, Patuxent, 6; October 26, House of Correction, 6; October 30, at MCI, 11; October 31, at MCTC, 4.

November 2, Penitentiary, 5; November 14, House of Correction, 3; November 16, House of Correction, 4; November 21, Penitentiary, 1; November 23, Penitentiary, (110) 2; November 28, Penitentiary, 3; November 30, House of Correction, 5.

December 5, House of Correction, 2; December 7, House of Correction, 4; December 12, Penitentiary 4; December 14, House of Correction, 6.

January 4, '74, Penitentiary, 5; January 6, MCI, 8; January 9, MCTC, 4; January 16, House of Correction, 5; January 18, House of Correction, 5; January 25, House of Correction, 7; January 30, House of Correction 5.

February 1, Patuxent, 4; February 6, Penitentiary, 6; February 13, MCI, 10; February 14, MCTC, 7; February 20, Penitentiary, 4; February 21, Penitentiary, 1; February 22, House of Correction, 8. That's it.

Q. Now, Mr. Lusby, at the hearing, just a couple of questions. First of all, is it true that the hearing is conducted in accordance with the regulations of the Commission and in accordance with the Grievance Commission Statute? A. Did you specify a particular institution?

Q. No, I specified all hearings. A. At the hearings?

(111) Q. All hearings, yes. A. Yes.

Q. All hearings are conducted in accordance with each of those? A. Yes.

Q. Are there any other regulations, rules, procedures or policies written that guide the Grievance Commission at a hearing? A. You mean writing relating specifically to the Inmate Grievance Commission?

Q. Relating specifically to the conduct of an Inmate Grievance Commission hearing. A. No.

Q. Are there any such unwritten rules, regulations, policies, practiced? A. Yes. We follow the usual quasi-judicial administrative agency guideline of accepting evidence which is of the caliber that would lead a responsible person in the conduct of a, his normal business affairs to make a rational decision.

Q. Anything else? Any other unwritten practices? (112) A. No.

Q. After the hearing, Mr. Lusby, could you explain what the decision making process is, and by that I mean when does it take place, who participates in it, where does it take place and any other thing that you think is relative in defining the decision making process? A. It usually occurs immediately following the hearing session at the institution before the Commissioners go their separate ways. There is a discussion period attended by Mr. Wolf and, if I am there, by me, at which time the Commissioners decide, if possible to do so then, what they wish their decision

to be and instruct Mr. Wolf of along what lines to draft the order for their review.

On rare occasions, the decision is made later, either in personal conferences or by phone call conferences when they, for example, think they would like to think it over for awhile, that sort of thing.

Q. Does anyone besides the Commissioners who actually heard the case participate in the decision making process? (113) A. Occasionally, I am asked what I think about a certain matter.

Q. And, to your knowledge, does that also happen with regard to Mr. Wolf? Is he occasionally asked, do you know? A. It's my belief that he is not.

Q. How about Commissioners who don't necessarily hear the case, but who are Commissioners, are they typically asked their opinion or have they been asked their opinion? A. Occasionally.

Q. How about the Secretary— A. You are talking about somebody on the panel being asked about a matter he didn't hear, involving a question of law or something like that?

Q. Yes. A. That would happen, for example, when the three non-lawyer members constituted the panel that heard the case and perhaps a heavy constitutional question came up and they would solicit the advise of Mr. Boss, the Chairman, and/or me with regard to the legal (14) ramifications.

Q. As I understand it from your prior testimony, the advice of the Attorney General's office is also occasionally solicited? A. Yes, extremely rarely.

Q. Who does that normally? A. Who requests it?

Q. Yes, who requests it? A. I do.

Q. And the Commissioners would ask you to request it and then you would make the formal request? A. Right.

Q. The deposition asked you to bring with you today any Attorney General's opinions that you received, and I am not going to ask that they be introduced into

evidence and I am not going to ask you what the opinion of the Attorney General was, but I would appreciate it if you would state for the record the number of the cases in which opinions were asked and, if you can, without a whole lot of effort, be able to tell what the issue was the Attorney General was asked to resolve? (115) A. We didn't ask any in this one, May 10, 1973. The Secretary requested the opinion of the Attorney General in—

Q. Before you begin, Mr. Lusby, do you have there a file of all the Attorney General's opinions that you have received, the Commission has received? A. These are just things that relate in any manner to the Attorney General's office.

Q. How many total opinions have you or the Secretary received? A. Four.

Q. Four, total? A. Four.

Q. Could you tell us what cases they were asked opinions for? A. May 10, the Secretary asked for, I can't tell you which case it was, because I've got the opinion of the Attorney General and it doesn't reference the case.

Q. Can you tell generally what the topic is? A. Adjustment procedures and the extent of due process required.

(116) Q. Could you give us the same information for the other three, the number of the case, if it's available and the subject matter? A. May 25, '73, an opinion of the Attorney General re: Edward T. Green, our number 1273. Liability of correctional institutions for the torts of its agents. In other words, the applicability, if any, of the doctrine of respondeat superior.

September 7, 1973, an opinion to me, asking the advice and receiving the advice from the Attorney General about whether or not we can erase out cassette tapes in order to reuse them after a reasonable period of time has elasped. Is this not a superlative response to a subpoena duces tecum?

October 1, 1973, the Secretary requested the advice of the Attorney General and received it on the question of since the Inmate Grievance Commission is an administrative agency and its proceedings are civil in nature, the rules of indigency apply.

Q. Mr. Lusby, I think where we were when we — how do you determine, Mr. Lusby, what Commissioners are (117) going to hear what cases? A. They work that out among themselves. I send them copies of the synopsis letters to the institutions which puts them on notice that a hearing is going to be held at a certain institution on a certain date, and they determine among themselves who is going to attend.

Q. I think where we were, Mr. Lusby, when we broke into talking about the Attorney General's opinions for a moment, that is who participates in the decision making process, and you testified that you occasionally are asked about a case or the Commissioners who were not necessarily sitting on the case may be asked. The final question along that line, to your knowledge, does Secretary Lally ever participate in the decision making process in any way? A. You are talking about the issuance of our initial order?

Q. Yes. A. No. He remands, thereafter, sometimes for a further hearing or modifies, reverses, that sort of thing.

(118) Q. Let me ask you something about that. I was going to get to it later. A case, as I understand it, if it's a meritorious case, goes to Secretary Lally for his opinion? A. Pursuant to the Statute.

Q. He can reaffirm, reverse or modify? A. Within 15 days.

Q. Have there been any situations that you know of where Secretary Lally has taken any other courses of action besides one of those three things? A. Aside from affirming, reversing or modifying?

Q. Yes. A. Well, it's a legal question. I don't know if it's different than those three or not. That's all — somebody else will decide that, but he every once in a great while remands something for further hearing or

for rewriting of an opinion because it doesn't contain enough facts for him to make an intelligent decision on.

Q. In the cases — go ahead. A. That's about all that comes to mind.

Q. In the case where that happens, is that done (119) formally by him or is it done informally by him? A. Formally. He sends a memorandum covering the order being sent back to us for a rehearing or beefing up, so that he can make an informed, intelligent decision.

Q. Let me try to define formal and informal. As I understand it, under the Statute, Secretary Lally has 15 days within which to review an order of the Grievance Commission? A. That's the way I read it.

Q. And what he has to do, as it reads in the section, within those 15 days is to affirm, reverse or modify. Has there ever come a time when Secretary Lally has not actually signed a formal order with regard to a case that has come to him, but has sent a case back to the Grievance Commission either for a rehearing or to be rewritten without his actual formal order being signed on a case? In other words, just a letter or memorandum? A. Prior to his order being signed, yes.

Q. Prior to his final order being signed? A. Yes.

Q. How often does that occur? (120) A. Maybe a half a dozen times in the last two years.

Q. Half a dozen times total? A. Yes.

Q. As you read the Statute, Mr. Lusby, is that particular procedure provided for in the Statute? A. Not specifically, but as I say, it's for somebody else to decide whether affirm, reverse or modify would include such a procedure. I don't see why it wouldn't.

Q. Such a procedure being a remand or request for rewriting? A. Remand, yes. The word remand is also used in the covering memorandum.

Q. What we're talking about — let me ask you one more question about that, just so we're on the same wave length. The covering memorandum is different from the order that is actually signed by Secretary

Lally, isn't it? A. Oh, it's a memorandum to the Inmate Grievance Commission from Secretary Lally.

Q. It's not his final order, in other words? (121) A. It's not an order at all, no.

Q. And that has happened six times? A. About a half dozen.

Q. After the hearing, Mr. Lusby, and before a decision is made by the Commissioners, and before an opinion is written, have there ever been any cases where information has been gathered and added to the file or added to the record, besides what was gotten at the hearing? A. There have been maybe a dozen instances of that, yes.

Q. And what has that information been? A. Oh, it's almost always different, but it's something pertinent that the Commission wanted either from the inmate or the institution at the time of the hearing and the institution or the inmate promised to send it.

Q. Would an example be an Attorney General's opinion? A. An Attorney General's opinion?

Q. Let me withdraw that question, because that (122) obviously isn't an example because I was asking you about facts, not a legal opinion. You are saying, as I understand it, in a dozen or so cases over the past two years there have been decisions where after the hearing the Grievance Commission has received and considered facts about a case that were not brought to their attention at the hearing? Is that your testimony? A. Amplification or documentation of facts that were brought to their attention during the hearing.

Q. I see. A. That they wanted to see, like medical records, institutional medical records, a letter from an inmate's doctor prior to his incarceration as to what medication he should receive. We had several of those, where an institution doctor disagrees with the guy's doctor when he was on the street, and we have to decide which one we're going to go with.

Q. In these dozen or so occasions, then, could the information fairly be said, this kind of information

we're talking about now, could it fairly be said to be always have been solicited by the Commission as opposed to (123) received unsolicited by the Commission? A. Yes, right.

Q. In every case that has been the situation? A. As far as I can recall. I don't recall any other.

Q. As I read the Statute, Mr. Lusby, the Inmate Grievance Commission after hearing the case can make one of three decisions. It can hold the case partly meritorious, wholly meritorious or totally unmeritorious, is that right? A. Right.

Q. Is there any other possibility? A. No.

Q. And, as I understand it, meritorious cases go to Secretary Lally for his final decision, as we discussed? A. Right.

Q. What papers specifically go to him? A. What papers?

Q. Yes. A. He gets the original of our order and a covering (124) letter from me to the effect of herewith is an order in the captioned matter pursuant to whatever section it is, subsection it is of the Statute. Kindly advise me of your action in this matter.

Q. Has it been your experience that Secretary Lally always acts within 15 days? A. Yes. Usually much sooner.

Q. Does Secretary Lally get any other papers besides the order itself of the Commission? A. No.

Q. In other words, he doesn't get the file in the case? A. No.

Q. And he doesn't get the tape recorded hearing? A. No.

Q. The hearings are tape recorded, is that right? A. Casette.

Q. What does he do with the — what does he do after he has decided on the case? He sends it back to you, or what, or does he contact the institution? Does he contact the Plaintiff? (125) A. He sends the order with his statement saying affirmed, reversed or modified,

and explaining the modifications to the Commissioner of Correction with a covering letter saying, herewith is, and please let me know within 30 days in writing what specific measures have been taken to comply with the order. A photocopy of that is sent to us and then distributed to everybody who is involved.

Q. I believe the last time you testified in the McCray case, Mr. Lusby, you said something about the — let me ask you a preliminary question to that. The institution people that Mr. Lally sends the order to, does that go to the Warden? Does it go to the Defendant, the Commissioner— A. It goes to the Commissioner of Correction in order, as I understand it, that he can inform all of the institutions of precedent that is being set and rules that are being made by the Inmate Grievance Commission.

Q. So every ruling that is favorable to an inmate that comes from Secretary Lally goes to Jordan and then Jordan disseminates it— (126) A. To the various institutions, all the institutions.

Q. Including the particular Defendant, the institution. A. Yes.

Q. They don't get it directly from you— A. They do get a copy from us, but it's got to be a duplicate, because I know that Jordan is also sending them up, but I am not going to take that chance. They are going to get a copy from us, too.

Q. The last time you testified in the McCray case, Mr. Lusby, you said something about there being a three-day period when the order is sent to the Commissioner, but not sent to the inmate. I'm not phrasing it properly, but do you know what I'm referring to? A. The time delay set—

Q. Explain what that is and what the purpose of it is. A. The Secretary initially was sending the meritorious orders at the same time to the inmate and the Commissioner of Correction and that was creating difficulties with them, some of the institutions, because (127) the inmate was receiving his copy of the meritorious order instructing corrective action to be

taken or appropriate relief to be granted and such things were happening as it was being posted on the bulletin board and just disrupting the institution, and this was before the Warden and the people at the institution even knew it, because it takes a few days to filter through the process at the Division of Correction from the Commissioner's office and to the people in there who, it is my understanding, he has a staff of three or four who work on Inamte Grievance Commission matters and the Warden, for example of the Penitentiary, and from the Warden, for example, to Major Mills, who is the liaison man now. Now he sends it three days later to the inmate and to the Commissioner of Correction, in order that both of the immediate parties, the litigants, if you wish to call them that, be informed at the same time.

Q. That's what I was going to say. The purpose of the three-day procedure is so that the two people who are closely involved in the case will find out about it at approximately the same time? (128) A. Right.

Q. And it takes into consideration the time lag necessary to have the order filter down from the Commissioner into the institution, is that right? A. That's right.

Q. In addition to the reviewing of the decisions of the Commission, does Secretary Lally have any other typical involvement with the Grievance Commission? For example, does he come to staff meetings or does he hold staff meetings? Does he send you down policy memoranda? Does he have any other involvement? A. I attend all the agency head meetings of the Department of Public Safety and Correctional Services, of which he is the Secretary, and I am in contact with him or the staff on a daily basis on all matters relating to the running of the agency.

Q. All right, just a few other questions, Mr. Lusby. One of the items that we asked you to bring with you to the deposition today were the cases of the Inmate Grievance Commission that were appealed to the courts, which is provided for under the Statute, and I'm wondering (129) if you could quickly tell us the

number of Inmate Grievance Commission cases, the name of the Plaintiff or Appellant in each of those cases and exactly what the disposition has been of the Court in appeal and, if any are pending presently, you could tell us which ones are pending? A. Just one second. I've got a list.

Q. All right, sir. We don't need a great deal of detail on these. As far as the disposition, if you could just state whether the court affirmed, reversed, remanded. A. Name and our number?

Q. Yes. A. You want to know if they were reversed or remanded?

Q. Or modified, whatever the court did, or affirmed.

(Disscussion held off the record.)

(Mr. Morgan) Let's take a short lunch break.

(Luncheon recess.)

(130) (Mr. Morgan) We're back on the record now, Mr. Lusby, and I believe where we were in the deposition was you were going to give me some information about some appeals that have been taken to court in Inmate Greivance Commission decisions. Before we get into that, there was something that occurred to me over the lunch break about something I was asking you about before that I would like to ask a couple of other questions about.

Q. You testified that when a grievance is found to have merit, it goes to Secretary Lally and Secretary Lally has the choice of doing one or two or three or four things with it. Assuming he affirms the grievance, the question is how does the inmate find out about his disposition? Does Secretary Lally send the inmate the affirmed answer or does the Grievance Commission send the inmate the affirmed answer? A. The Secretary does.

Q. The Secretary does? A. Yes.

Q. Suppose the Secretary modifies or reverses? He still would? A. Yes.

(131) Q. So after the Secretary makes a decision then on a grievance, he sends Mr. Jordan something, he

sends the inmate something, he sends you something? A. That's it.

Q. And that's it? A. Yes.

Q. All right. A. We make any further distribution that is required.

Q. All right. Now, he sends the papers to Mr. Jordan and to you the same day, as I understand it, is that right, and he sends the paper to the inmate three days later, is that right? A. Right.

Q. How long has it been that the three-day rule, if I may refer to it as that, has been in effect, do you remember? A. A long time.

Q. Since before you came or after you came? A. Afterwards, but its been in effect about a year and a half, I'd say.

Q. Whose rule is that? Is that your rule or (132) Secretary Lally's rule? Who decided to have that, do you remember? A. I remember the problem being — the matter being discussed and — I'm really not clear on something that happened a year and a half ago like this.

Q. Who was the discussion with? A. I think the Secretary asked me what I thought about that procedure and my reply was I couldn't see anything wrong with it.

Q. Well, is it fair to say that you and he were having a discussion about this problem you talked about before? A. It was specifically about that. Maybe he phoned me or something and said — as I remember, as is usually the case with most things, one specific thing precipitates it and I think at one of the institutions one of the inmates had been running around waving an order at all the guards' faces and so forth, about, "Look how I gave it to you," and it was disturbing everybody, if the situation existed, if the Warden on down to the correctional officer didn't know such an order (133) existed, and we said what if we staggered the mailing by three days, or maybe I suggested it. I don't know which.

Q. But that conversation you had with Mr. Lally was precipitated by that incident, is that right? A. Or some such incident, as I recall it.

Q. And the decision to put the three-day rule into effect was made either by you or Mr. Lally during that conversation? A. No, I think it was made by both of us by agreement.

Q. But nobody else — it was one of you two? A. It was by the two of us, yes.

Q. Together? A. As I recall it, yes.

Q. Let's get, if we can, to the cases that have been appealed and the question is the same with regard to each of them. What is the name of the inmate, the Inmate Grievance Commission number, and what was the disposition of case on appeal or is it pending presently? A. All right. The following appeals are pending, so there is no court decision. Walter Noble, IGC (134) No. 1365, Aaron Holsey, Nos. 1494 and 1767, James J. Owens — now, I know he's got two in, 1539 and 1570, Robert James, 1538, Doris Dyson, 1555, Clevon Tilghman, 1669, Linwood Nilsen, 1838, Garcia Wright, 1878, Charles Creighton, 1925, H. Manford Fix, Jr., 2147, Arthur Middleton, 1444, Charles Smith, 1556.

Now, the following, we have had decisions: Frederick Switzer, 1183, affirmed, Charles Allen, 1173, affirmed, Franklin Lee Minor, 1191, affirmed, James M. Jourdan, 1041, reversed, Kilgoe, Boston and Matthews, 1191, 1195, affirmed, James M. Neam, 1240, affirmed, Larry White, 1662, reversed, John Jackson, 1528, affirmed, Thomas E. Saul, 1680, affirmed.

There have been two appeals from orders of the Secretary. Are you interested in those?

Q. Please, yes. A. You know, that would be where obviously, since only the inmate can appeal, that would be where the Secretary reversed it, the Inmate Appeal Commission and then the Secretary reversing us, and they have both been disposed of. John H.X. Washington, 1327, the Secretary's (135) order was reversed, Robert Faulks, 1474, the Secretary's order was reversed.

(Mr. Morgan) Off the record.

(Discussion held off the record.)

(Mr. Morgan) Let the record show that while we were off the record, I asked Mr. Lusby a couple of qualifying questions about the information that he had just given us concerning appeals that are apparently pending — appeals that were listed by him just now as pending. It appears that a certain number of those are on remand before the Inmate Grievance Commission and a final decision hasn't been issued by the Grievance Commission on the complaint, but the court involved has made a decision.

Q. Now, my question to Mr. Lusby is, of those cases which were listed as pending by you just now, which of those has there been a decision by the court? A. Walter Noble was remanded to the Commission for the making of a transcript. The reason for that was under the initial Statute, until it was amended in the '73 legislature, the recording of the Commission's (136) hearing sessions was not required, it was discretionary, and some sessions were recorded, some were not; but any that were appealed, it turned out the court always wanted a transcript. Now there is no difficulty about that. There was at that time. Walter Noble—

Q. That was Noble you just spoke about. A. Arthur Middleton, Frederick Switzer, Franklin Lee Minor. I believe that's all. In addition, Linwood Nilsen has been remanded for the Commission to conduct a further hearing on two issues involved in the appeal. So it is still on appeal. The others have been terminated or pending, as earlier indicated.

Q. Just so we're straight then, of the ones you listed before as pending, there are five which the courts have issued orders remanding to the Commission? A. For the making of a transcript, except for Nilsen.

Q. Middleton, Switzer, Minor and Noble were all remanded for transcript? A. Right.

Q. And Nilsen was remanded for rehearing? (137) A. On two issues, right.

Q. And there have been no other remands, is that right? A. Not that I recall.

Q. All right. You are having a copy made of that sheet of paper you were reading off of, is that right? I think if Mr. Stutman has no objection, we'll put that in as Exhibit No. 5, when it returns from the Xerox machine.

(Paper showing appeals pending, appeals terminated, and appealed Secretary's order, dated February 27, 1974, was then marked as Plaintiff's Deposition No. 5.)

Q. Mr. Lusby, when you testified in the McCray case, there were some questions asked by both parties, I think, concerning the availability to a litigant before the Inmate Grievance Commission to litigate in the nature of a class action, and I believe your testimony was, and you can correct me if I'm wrong, that there is nothing specific in the Statute or in the regulations about a class action before the Grievance (138) Commission, but that, in effect, Grievance Commission decisions, if affirmative in favor of the inmate, could have the effect of granting class relief? A. No question.

Q. Is that a fair statement of class action under the Grievance Commission? A. Yes. Also, it's not — well, it sometimes happens an inmate files a complaint on behalf of himself and all others who — I'll say something like we're in the same boat, meaning all others similarly situated like somebody segregated in the south wing of the Penitentiary, about conditions in the south wing, we treat that in the nature of a class action.

Q. When you get that kind of a complaint, when you get one that doesn't specifically say, I'm filing on behalf of others, but one that would appear to affect others were there to be a favorable decision, does the Grievance Commission notify those other people who may be potentially affected by the decision? A. Not unless it would be coincidentally.

Q. Is there— (139) A. Such as they were requested as a witness, or something like that.

Q. Is there any procedure that the Grievance Commission typically uses in these kind of cases for getting by what would be something in the nature of intervention of those other people into the case? A. I'm sorry, you lost me.

Q. Well, assuming a case comes before the Grievance Commission that is brought by a single or one or two people, either on behalf of others or one in which the Commission is aware that a favorable decision would affect others, you testified, I believe, that those others, in either one of those two situations, are not specifically notified by the Commission that this hearing is taking place and that it may affect them. A. Right.

Q. What I am asking now is kind of a sub-question under that. Does the Grievance Commission do anything about making sure that those people intervene in the case in anyway at all? A. No.

(140) Q. What does the Grievance Commission do in order, if anything, what does it do, if anything, to protect whatever rights those other people may have as a result of this particular claim being litigated by a representative person? A. Once again, I don't understand.

Q. Well, let me withdraw that. Maybe we're talking about abstractions. Have you, as the Executive Director, or any other person in the Grievance Commission that you know about, received complaints either in the nature of a formal grievance or just a letter of complaint by people in institutions, any of the institutions, who have been affected by a favorable ruling of the Commission but who is dissatisfied with that ruling? A. Yes, one time.

Q. When was that and what situation was that? A. MCI. Can we go off the record a second to get the specific stuff?

Q. Yes.

(Discussion held off the record.)

(Mr. Morgan) Let the record show that we're waiting (141) for Mr. Wolf to find the case that we were

talking about with regard to my last question and, in the meantime, I'll ask Mr. Lusby a couple of other questions.

Q. As I understand the Statute, and correct me if I'm wrong, only meritorious recommendations of the Commission go to Secretary Lally for his action, is that correct? A. Yes.

Q. Only meritorious findings by the Commission? A. Right.

Q. When an order of the Commission goes to Secretary Lally, I believe you testified in the McCray case that it went in the form of a recommendation, is that right? A. No, it goes in the form of an order which amounts to a recommendation because it's subject to his action. It does not become what I would call an order in the context that I think of an order, with my 15 or 16 years as a lawyer, until he affirms, modifies or reverses. So it's tantamount to a recommendation, but it is the Commission.

(1442) Q. It's the Commission's order, but it doesn't have the power to cause anybody to do anything until the Secretary puts his stamp of approval on it? A. Right.

Q. After that happens, after the Secretary reviews an order and either — well, after the Secretary reviews an order and finds that it does have merit and approves it, does the Inmate Grievance Commission have any further responsibility for the enforcement of that order after that? A. I don't know if you mean statutory or jurisdictional authority? We do—

Q. Let's start statutorily. A. We do enforce.

Q. How do you do that? That's what I'm interested in finding out. A. Whether we've undertaken it ourselves or whether or not it was intended, I don't know. We have assumed it.

Q. In what kind of situations? Can you give an example of when you have had to enforce an order and (143) what you did to enforce it? A. Oh, there have been occasional — it's rare that the institution

does not comply. They comply, but sometimes they will be slow in holding a classification hearing that we ordered. An inmate will write me and say, I haven't had the hearing that was ordered three weeks ago, and I'll call up and ask what the story is and then it gets scheduled and it's held. Compliance is self-policing because the inmates get a copy of the order and if — let's put it this way. If he does not consider the order to have been complied with, he lets me know about it.

Q. On how many occasions would you say you received notice from an inmate that an order he received from the Secretary has not been complied with? A. No more than a half dozen, and usually, that's tardiness. Usually, that's just tardiness.

Q. And your normal response to that is to call the institution and ask what is going on? A. Or write.

Q. Or write? (144) A. I usually just pick up the phone. Something like that I can accomplish by picking up the phone.

Q. Have you ever taken up one of those six occasions with Secretary Lally? Have you ever talked to Secretary Lally— A. About a non-compliance situation?

Q. Right. A. Only the procedure that ought to be adopted. I suggested sometime ago that the Statute be amended to provide that the institution or the Commissioner of Correction notify the Secretary or the Commission, and/or the Commission, within 30 days in writing specifically what measures have been taken to comply with the order, and the Secretary on the advise of Jack Lenz, who is Assistant Attorney General, decided that it could be accomplished rather than by amending the Statute administratively by just including that in his covering letter to the Commissioner, which he has done ever since.

Q. He gives the Commissioner 30 days within which to comply and inform him— A. Right.

(145) Q. Do you receive copies of the letter that comes back from the Commissioner to the Secretary? A. Yes.

Q. Is it your experience that those letters do come back within 30 days? A. Yes.

Q. I think probably by exclusion, you have already answered this question, but on these occasions when you receive complaints from inmates that there has not been compliance with an order, I take it it is not your practice to initiate that as a new grievance? A. No.

Q. You deal with it as compliance with the old grievance? A. It's the same grievance.

Q. And I think your testimony is, let me ask you again to be sure, in none of those — on none of those six occasions have you taken up the specific matter of non-compliance with Secretary Lally? A. No.

Q. You have only talked to Secretary Lally about (146) the general problem? A. The general procedure, right.

Q. The general procedure.

Now, do we have that information? What we're doing now, Mr. Lusby, is going back to the question that I asked you before concerning an inmate who designates himself or purports to be a spokesman for other inmates, but in fact turns out not to be and your testimony was that you knew of one example where inmates who had been affected by a favorable decision granted to one inmate objected to it? A. There has only been one. James B. Jones, No. 1912. He complained that he was being dehumanized by the "Urination call" procedure which gave inmates only two opportunities per night, and he also complained of other things, among which was — well, none of the others are pertinent. None of the others are pertinent. Our order issued on November 2, finding the complaint to be meritorious, and about six weeks later I began getting correspondence from inmates to the effect that despite the fact that he had said that he was speaking for everybody, ***

* * * * * *

PLAINTIFF'S DEP. EXHIBIT NO 2
(Filed February 28, 1974)

Mr. Dene L. Lusby
Executive Director
Inmate Grievance Commission
Executive Plaza One, Suite 402
Hunt Valley, Maryland (21031)

February 23, 1974

Dear Mr. Lusby:

In regards to your letter dated February 19, 1974, I compile the enclosure and hope the following can clarify my full intentions of presenting the following allegations against the "Administration Staff and Correctional Officers" employed at the Patuxent Institution, at present.

At this date, I represent myself in propria personam — however, my attorney is aware of my action and may foreward his assistance as an attorney. If this be so, I will accept his professional ability and advise you, as the same — I am only a tyro.

My allegations are as follows, and they are in accordance with Supreme Court Rulings and my Constitutional Rights, which, have and/are being denied me, as of this date.

Yours Truly,

LEO JOHN RITES
Box 700
Jessups, Md.
(20794)

cc:
MR. JOHN FRANCOMANO, Esq.
116 W. Mulberry St.
Baltimore, Md. 21201

"Allegations"

(1) In accordance with Bundy v. Cannon, 323 F. Supp. 165 (D. Md. 1971) I am allowed to bring my "own attorney" to any disciplinary hearing which envolves me, in an infraction. This was denied me, and my attorney requested his presencen which, was denied him.

(2) I am denied "No Censorship of Outgoing Mail" in accordance with Guajardo v. McAdams, 349 F. Supp. 211 (S.D. Texas 1972) I am to mail my letters without censorship — which, is being denied me.

(3) In accordance with Wright v. McMann, 460 F.2d 126 (2nd Cir. 1972) "No punishment disproportionate to the offense (and therefore "cruel and unusual"). I was put into a cell with no bed, blanket, sheet — just a "sink and toilet" and I had "all clothes" taken from me.

(4) In accordance with Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971). I am allowed "decent conditions in solitary confinement, which, was denied me.

(5) In accordance with Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972). I am allowed "decent conditions throughout prison (living conditions, medical care, rehabilitation programs, protection from attack by other inmates, etc.). I am being denied proper and sufficient medical care, I am being denied entrance into rehabilitation programs, and certain decent living conditions are denied me.

Sir:

The above clearly and briefly discloses my allegations. If and when you, schedule me, for a "Hearing" before the Honorable Inmate Grievance Commission — in full detail, I will explain and prove beyond all reasonable doubt my rights are violated and certain aspects of discrimination and prejudice are shown me, because, I am a Non-Committed Man at Patuxent Institution.

I want the following employees of the Patuxent Institution at my Hearing: Mr. F. Calhoun, Supt., The Dentist and Medical Doctor, Lt. Thomas (4-12 shift) Officer Gee (8-4 shift) Dr. Barrance, Capt. Kenny (8-4 shift) Mr. Jordon (clothing room officer).

I want the following inmate(s) Victor L. McClenden (F-2 Tier) Freddy Jones (F-2 Tier).

I also request my attorney receive a copy of any/and all letters wrote me, in regard to this letter? Thanking you, very much, I am

Yours Truly,

LEO J. RITES

cc: JOHN FRANCOMANO, Esq.

PLAINTIFF'S DEP. EXHIBIT NO. 3

INMATE GRIEVANCE COMMISSION

Information to Inmates

The Inmate Grievance Commission, created by Acts of 1971 by the Maryland Legislature, will review any grievance or complaint by any person in the custody of the Commissioner of Corrections or confined in the Patuxent Institution *against any officials or employees of the Division of Correction or the Patuxent Institution.*

The Commission is a separate agency within the Department of Public Safety and Correctional Services. It is made up of five Commissioners appointed by the Governor. The Commission also has an Executive Director, Dene L. Lusby.

The Commission cannot review complaints concerning parole or probation nor can the Commission review a person's trial or conviction. It should also be understood that the Commission cannot handle *requests*, such as requests for transfer, reclassification, early release. Requests should first be sent to the appropriate person in the institution. Then, if the denial is clearly unfair, a complaint may be filed with this Commission. If the complaint or grievance arises out of a disciplinary action within the institution, all adjustment procedures, including review by the Warden, must first be completed.

Here is how to file a complaint. A complaint may be filed in letter form, specifying exactly and briefly the

nature of the complaint or grievance. The complaint or grievance should include the following:

a. Date.
b. Name, number and present address of person making complaint.
c. Classification status (Max., Med., Min.) or Tier level.
d. The nature of the grievance or complaint.
e. The person or persons responsible for the act or condition complained of.
f. The *facts* or evidence on which the complaint is based. Give *dates*, *times*, and *names* of any persons involved.
g. Names and addresses of witnesses desired by the complainant.
h. The name of counsel, lawyer, friend or relative, if any, who will appear at the hearing.

The complaint should be placed in a sealed envelope and mailed to:

Inmate Grievance Commission
Suite 402, Executive Plaza One
Hunt Valley, Maryland 21031

The Commission will acknowledge the complaint, give it consideration and take whatever action is appropriate as soon as possible.

A preliminary review of the complaint will be made by the Commission or the Executive Director to determine if there is any merit to the complaint if the facts are found to be true. If the complaint has no merit on its face, it may then be dismissed without a hearing. If the complaint or grievance has merit on its face, the Commission may hold a hearing on the matter if desired by the inmate.

The Executive Director, or a Commissioner or staff member, may make an investigation of the problem, including requests for copies of records, interviews with inmates or correctional officers or other personnel involved. The purpose of the investigation is simply to

determine whether or not there is disagreement regarding the facts and whether the problem can be easily and fairly resolved.

Hearings will be held at the institutions at the earliest convenient time. The hearings will be only as formal as may be necessary to protect everyone's rights and to make possible a fair decision. This Commission is not a court of law and there are few rigid rules or procedures.

The inmate, at his expense, may be represented by a lawyer or another inmate, and the inmate (or the lawyer) has the right to question or cross-examine any witness who testifies. Of course all witnesses may be questioned by the Commission, and the Commission may determine the extent of the examination. A verbatim record will be made of the hearing, and witnesses may be questioned under oath. However, there are no strict rules of evidence to be followed.

The inmate and the Commission are also entitled to have access to records and documentary evidence related to the grievance, with the approval of the Secretary of the Department of Public Safety and Correctional Services; and the Commission may, if necessary, issue a subpoena.

After the hearing, the Commission will deliberate in private and make a decision on the merit of the grievance or complaint. If the complaint is dismissed, the inmate may appeal the appropriate Circuit Court.

If, however, the Commission decides that the grievance or complaint is meritorious in whole or in part, a written order is sent to Colonel Robert J. Lally, Secretary of the Department of Public Safety and Correctional Services. This order will state the Commission's findings and decision and recommendations for solution to the problem. The Secretary may then affirm, reverse, or modify the order and direct any necessary action in the matter.

The Secretary's order is final, however, the inmate may petition the Circuit Court for review of the record of the proceedings.

PLAINTIFF'S DEP. EXHIBIT NO. 4
(Filed 2/28/74)

DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES
INMATE GRIEVANCE COMMISSION

Your complaint has been scheduled for hearing before the Commission on . At that time you will have an opportunity to appear and present your grievance.

You may call a reasonable number of relevant witnesses if necessary, and you will be allowed to question any witnesses who testify. A representative of the institution will be present.

You have the right to be represented by an attorney of your choosing at your expense or by another inmate if you wish. However, the Commission cannot provide a lawyer for you. If you desire legal representation and cannot afford it, you may wish to apply to the Prisoner Assistance Project of the Legal Aid Bureau, Inc., 341 North Calvert Street, Baltimore, Maryland 21202 and its phone number is 539-5340. The determination as to whether or not to represent you is within its discretion and I suggest that if you are going to contact the Prisoner Assistance Project, you do so as far in advance of the hearing date as possible.

If you wish to call witnesses, please notify this office if you have not already done so. If you wish to request a postponement of your hearing, please do so as far in advance of the hearing date as possible, specifying the reason for such request.

Sincerely,

DENE L. LUSBY,
Executive Director.

PLAINTIFF'S DEP. NO. 5
(Filed 2/28/74)

Appeals Pending

Name	*IGC No.*	*Date IGC Order Issued*	*Date Notice of Appeal Received*	
Noble, Walter	1365	1/29/73	3/2/73	
Holsey, Aaron	1494 & 1767	12/21/73	1/4/74	
Owens, James J.	1530	Adm. Dis.	12/5/73	
James, Robert	1538	2/2/73	2/28/73	
Dyson, Doris E.	1553	1/25/73	4/3/73	
Owens, James J.	1570	Adm. Dis.	2/28/73	
Tilghman, Clevon	1669	9/28/73	10/29/73	
Nilsen, Linwood	1838	7/27/73	8/24/73	
Wright, Garcia X.	1878	8/31/73	10/1/73	
Creighton, Charles	1925	Adm. Dis.	1/25/74	
Fix, H. Manford, Jr.	2147	12/10/73	1/3/74	
Middleton, Arthur	1444	11/30/72	1/2/73	
Smith, Charles	1556	1/22/74	2/20/74	

Appeals Terminated

Switzer, Frederick	1183	4/17/72	6/2/72	Aff.
Allen, Charles	1173	4/3/72	5/3/72	Aff.
Minor, Franklin L.	1191	12/12/72	2/19/72	Aff.
Jourdan, James M.	1041	1/27/72	2/10/72	Rev.
Kilgoe, Boston & Matthews	1195	8/2/72	11/9/72	Aff.
Neam, James M.	1240	9/7/72	10/10/72	Aff.
White, Larry	1662	3/16/73	4/17/73	Rev.
Jackson, John	1528	4/2/73	5/3/73	Aff.
Saul, Thomas E.	1680	7/24/73	8/24/73	Aff.

Appealed Secretary's Order

Washington, John X.	1327	12/27/72	2/8/73	
Faulks, Robert	1474	2/8/73	4/5/73	

PLAINTIFF'S DEP. NO. 6
(Filed 2/28/74)

NUMBER OF COMPLAINTS RECEIVED

January 16, 1974

1971		1973	
January	2	January	54
February	1	February	42
March	0	March	44
April	9	April	49
May	7	May	53
June	15	June	62
July	16	July	60
August	24	August	60
September	16	September	56
October	31	October	65
November	30	November	48
December	18	December	45
Total	169	Total	638

1972		1974		
January	17	January	32	(As of 1-16-74)
February	16			
March	29			
April	66			
May	39			
June	38			
July	38			
August	74			
September	47	1971	169	
October	56	1972	510	
November	51	1973	638	
December	39	1974	32	(As of 1-6-74)
Total	510	Total	1349	

PLAINTIFF'S DEP. NO. 7
(Filed 2/28/74)

January 15, 1974

Herewith is the tabulation by categories of the 515 matters heard to date by the Inmate Grievance Commission. The total of 596 is the result of multiple grievances filed by an inmate in one complaint.

Appeals from classification actions	— 97
Appeals from disciplinary actions	— 262
Property theft	— 35
Inadequate medical care	— 37
Assault by correctional officers	— 19
Interference with exercise of religious beliefs	— 7
Racial discrimination	— 14
Denial of commissary privileges	— 5
Lack of reevaluation on segregation	— 1
Interference with visiting privileges	— 6
Interference with mail	— 12
Impropriety of institutional rules	— 35
Harassment by correctional officers	— 24
Institutional records incorrect	— 9
Conditions on South Wing of Penitentiary	— 13
Negligence on part of correctional officers or institutions	— 20
TOTAL	— 596

PLAINTIFF'S DEP. NO. 8A
(Filed 2/28/74)

January 31, 1974

INMATE GRIEVANCE COMMISSION

Total complaints received: 1385

Administrative dismissals: 752
(Lack of jurisdiction, withdrawals, informally resolved, etc.)

Number of cases heard: 533

Cases Open: 100
(To be investigated and/or heard if not withdrawn or informally resolved.)

* * * * * *

Number of Orders issued: 466

Meritorious: 152

Without Merit: 296

Moot: 18

Cases heard and awaiting Orders: 67

* * * * * *

Cases scheduled for hearing: 59

Cases not scheduled for hearing: 41

Cases heard January, 1974: 39

PLAINTIFF'S DEP. NO. 8B

December 31, 1973

INMATE GRIEVANCE COMMISSION

Total complaints received: 1319

Administrative dismissals: 720
(Lack of jurisdiction, withdrawals, informally resolved, etc.)

Number of cases heard: 507

Cases Open: 92
(To be investigated and/or heard if not withdrawn or informally resolved.)

* * * * * *

Number of Orders issued: 449

Meritorious: 145
Without Merit: 287
Moot: 17

Cases heard and awaiting Orders: 67

* * * * * *

Cases scheduled for hearing: 46
Cases not scheduled for hearing: 46
Cases heard December, 1973: 16

PLAINTIFF'S DEP. EXHIBIT NO. 8C

November 30, 1973

INMATE GRIEVANCE COMMISSION

Total complaints received: 1274

Administrative dismissals: 700
(lack of jurisdiction, withdrawals, informally resolved, etc.)

Number of cases heard: 491

Cases Open: 83
(To be investigated and/or heard if not withdrawn or informally resolved.)

* * * * * *

Number of Orders issued: 408

Meritorious: 136
Without Merit: 256
Moot: 16

Cases heard and awaiting Orders: 79

* * * * * *

Cases scheduled for hearing: 28
Cases not scheduled for hearing: 55
Cases heard November, 1973: 24

PLAINTIFF'S DEP. EXHIBIT NO. 8D

October 31, 1973

INMATE GRIEVANCE COMMISSION

Total complaints received: 1226

Administrative dismissals: 662
(lack of jurisdiction, withdrawals, informally resolved, etc.)

Number of cases heard: 477

Cases Open: 87
(To be investigated and/or heard if not withdrawn or informally resolved.)

* * * * * *

Number of Orders issued: 357

Meritorious: 115
Without Merit: 226
Moot: 16

Cases heard and awaiting Orders: 104

* * * * * *

Cases scheduled for hearing: 48
Cases not scheduled for hearing: 39
Cases heard October, 1973: 57

PLAINTIFF'S DEP. EXHIBIT NO. 8E

September 30, 1973

INMATE GRIEVANCE COMMISSION

Total complaints received: 1159

Administrative dismissals: 624
(lack of jurisdiction, withdrawals, informally resolved, etc.)

Number of cases heard: 420

Number of cases open: 115
(To be investigated and/or heard if not withdrawn or informally resolved.)

* * * * * *

Number of Orders issued: 344

Meritorious: 114
Without Merit: 216
Moot: 14

Cases heard and awaiting Orders: 71

* * * * * *

Cases scheduled for hearing: 80
Cases not scheduled for hearing: 35
Cases heard September, 1973: 44

PLAINTIFF' DEP. EXHIBIT NO. 8F
August 31, 1973

INMATE GRIEVANCE COMMISSION

Total complaints received: 1119

Administrative dismissals: 590
(lack of jurisdiction, withdrawals, informally resolved, etc.)

Number of cases heard: 376

Number of cases open: 153
(To be investigated and/or heard if not withdrawn or informally resolved.)

* * * * * *

Number of Orders issued: 331

Meritorious: 113

Without Merit: 205

Moot: 13

Cases heard and awaiting Orders: 42

* * * * * *

Cases scheduled for hearing: 62

Cases not scheduled for hearing: 91

Cases heard August, 1973: 13

PRISONER ASSISTANCE PROJECT
March 19, 1974

Dene L. Lusby, Esq.
Executive Director
Inmate Grievance Commission
Executive Plaza One, Suite 402
Hunt Valley, Maryland 21031

Re: *Washington v. Boslow*,
Civil No. 73-1025-N.

Dear Mr. Lusby:

On February 28, 1974, your deposition was taken in the above-referenced case. At that time, you were asked to produce two (or more) decisions of the Inmate Grievance Commission concerning mail regulations and the conditions of punitive or administrative segregation at Patuxent Institution. There is reference in the deposition to these documents, and the record was left open for their inclusion as Plaintiff's exhibits. It was my understanding that you would supply me with the documents the day of the deposition or shortly thereafter so that they could be forwarded to the reporter.

I would appreciate your sending me the decisions of the Commission to which you referred in your deposition so that they may be included in the record. If upon further research it appears that the decisions do not exist or were never made, please send me a letter to that effect so that the record will be complete.

Thank you for your attention to this matter.

Sincerely,

CHARLES F. MORGAN

CFM/arp
cc: Donald R. Stutman, Esq.

DEPARTMENT OF PUBLIC SAFETY AND
CORRECTIONAL SERVICES
INMATE GRIEVANCE COMMISSION

March 20, 1974

Charles F. Morgan, Esquire
Legal Aid Bureau, Inc.
Prisoner Assistance Project
341 North Calvert Street
Baltimore, Maryland 21202

Re: *Washington v. Boslow*
Civil No. 73-1025-N.

Dear Mr. Morgan:

In response to your letter of March 19, 1974, herewith are Orders of the Inmate Grievance Commission in the matters of Paul Brown Clark and Bernard E. Railey, Jr. (IGC No. 1033) and Roosevelt Drummond (IGC No. 1992), relating to administrative segregation at Patuxent.

The only complaint I have found relating to mail privileges from a patient at Patuxent is in the matter of Duane A. Carl (IGC No. 1895), in which no order was issued for the reason that the matter was informally resolved by means of modifications in the institution's mail procedures.

Sincerely,

DENE L. LUSBY,
Executive Director.

DLL/jh
Enclosures

cc: Donald R. Stutman, Esquire

STATE OF MARYLAND
INMATE GRIEVANCE COMMISSION

ORDER

In the matter of: Paul Brown Clark and
Bernard E. Railey, Jr., Patuxent Institution

IGC No. 1033

This matter was initiated by a letter of complaint addressed to the Inmate Grievance Commission dated November 24, 1971. The two petitioners complain that:

1. Inmates in protective custody should have privileges of the first level at Patuxent Institution.
2. Inmates should be permitted to keep more than twelve books in their cells at any one time.
3. Inmate Paul Clark should be allowed to take a high school equivalency examination, even though he is in protective custody on M-1.

The petitioner Paul Clark appeared before the Inmate Grievance Commission at a hearing held on May 26, 1972 at the Patuxent Institution, Commissioners Levitt, Williams, Bennett and Fulton participating. The Institution was represented by Mr. Forrest Calhoun, Assistant Superintendent of Patuxent Institution.

The petitioner, Bernard Railey, had previously been released from Patuxent. His complaints are therefore considered moot.

Findings of Fact

Mr. Clark is on protective custody at his own request, because he wants to keep out of trouble. He claims that while in protective custody on M-1 there are no programs for such inmates. He would like the same privileges as the general population enjoys. Mr. Clark has been at Patuxent six years and to date, has refused to be examined by the staff. He remains in diagnostic status; i.e., a "D-man".

Mr. Calhoun confirmed that Mr. Clark is on protective custody at his own request and can come off any time he desires. Mr. Calhoun states that all inmates on

M-1 are treated the same, due to the nature of available facilities and manpower limitations of the Institution.

Mr. Calhoun further stated that Mr. Clark had been involved in disturbances and was placed in administrative segregation; that he has consistently refused to return to the general population of diagnostic patients; that the best interests of this patient are being served and that the Institution cannot grant Mr. Clark special privileges.

Mr. Clark would like to have at least thirty books in his cell at any one time instead of the present twelve he is allowed. He claims it takes approximately one month to get delivery of books requested from the library. He also claims that library privileges are restricted as to protective custody inmates.

Mr. Calhoun stated that the Institution believes twelve books to be adequate. He states books from the outside must come directly from the publisher or a book store in order to be admitted. This means the Institution doesn't have to check for contraband and relevant security factors are minimized. Books received from a patient's family or friends are not allowed into Patuxent Institution.

Mr. Calhoun stated that the Institution does not accept the allegations as to unreasonableness of book delivery time and that in this area there is no discrimination as to patients on M-1 and in protective custody status, even though in D-man status.

Mr. Clark also raised the issue that he is unable to take the high school equivalency test while on protective custody as there are no facilities on the tier for such an exam. Mr. Calhoun states, that while he is in administrative segregation (protective custody), for him to take the test, they would have to assign an officer to Clark for that specific purpose. He can take the test any time he returns to the general population. Mr. Calhoun avers that this is a logical and reasonable rule of the Institution.

Conclusions

The Commission finds Mr. Clark's complaint Number 1 to be without merit. The Patuxent Institution is unable to respond affirmatively to any request for special privileges for inmates on M-1, whether in administrative segregation, protective custody or punitive segregation.

The Commission, likewise, finds no merit to Mr. Clark's second complaint. We believe that the allowance of as many as twelve books in a patient's cell at any one time is reasonable and this limitation should not be disturbed.

As to the third complaint of this petitioner, the Inmate Grievance Commission finds it to have merit to the extent that an opportunity to take the high school equivalency test should be afforded Paul B. Clark. This should be done by appointment coincidental with the availability of security manpower for the relatively short period of time required to complete the test. This should not be unduly burdensome on the Institution and we feel that, in its therapeutic significance, this could contribute in a positive manner to the treatment program at Patuxent, as well as to the welfare (morale) of this patient.

Disposition

Complaints Numbered 1 and 2 are dismissed.

The Commission recommends, on merit, affirmative action by Patuxent in respect of complaint Number 3; i.e., that arrangements be made to allow Paul B. Clark to take the high school equivalence test.

This 2nd day of October, 1972.

JEFFREY LEVITT,
Commissioner

MACEO M. WILLIAMS,
Commissioner

JAMES V. BENNETT,
Commissioner

E. A. FULTON,
Commissioner

DEPARTMENT OF
PUBLIC SAFETY AND CORRECTIONAL SERVICES

The Order of the Inmate Grievance Commission is affirmed.

This 10th day of October, 1972.

ROBERT J. LALLY,
Secretary.

STATE OF MARYLAND
INMATE GRIEVANCE COMMISSION

ORDER

In the matter of: Roosevelt Drummond
C-2195, Patuxent Institution IGC No. 1992

Mr. Drummond filed with the Commission a grievance complaining of indeterminate sentences to administrative segregation, contending that administrative as well as punitive segregation should be for a specific limited time. He also complains of the alleged unhygienic conditions of the cells and the conditions of administrative segregation generally.

The matter was heard at the Patuxent Institution on October 24, 1973 by the full Commission. Mr. Drummond was represented by Charles Edward Clark, Legal Representative of A.C.L.U. of Montgomery County, Maryland. Mr. Forrest Calhoun, Associate Director/Superintendent, represented the institution. Mr. Clark submitted a memorandum which he requested be made a part of the record in this case and in the matter of Randolph Johnson, IGC No. 1977. The memo was accepted by the Commission.

Findings of Fact

Mr. Drummond had been placed on administrative segregation as a result of an incident which occurred on June 30, 1973.

Mr. Calhoun testified that the status of the inmate patient is reviewed at least every thirty days by the

Unit Treatment Team and a memorandum is prepared for the institution.

It is contended that this is a professional determination for the purpose of deciding when the inmate should be released from administrative segregation.

The patient inmate is presumably advised by his therapeutist or another member of the Team, although no record is made of the fact that he is or is not actually informed of the results of such hearings.

Mr. Drummond indicated that he had not been informed of the actions of these Teams or of such reviews.

When questioned as to just what his grievance was, Mr. Drummond indicated that his main complaint was that he should be informed of the results of any hearings or reviews and that if his release had been denied he should be so advised.

At the time of this hearing there were six inmates in administrative segregation and Mr. Drummond indicated that some of the cell conditions of which he complained had been improved but more clean up was necessary in his opinion.

It appears that the cleaning of the hallways is performed by a group of inmates assigned to that work and that the cleaning of the individual cells is the responsibility of the occupant.

Conclusions

There has been no evidence submitted to this Commission to justify any action in respect of the decisions of the staff as to the confinement to administrative segregation in this case or any specific action as to the physical condition of the facilities.

However, it appears that under the present procedures all inmates could be continued in administrative segregation indefinitely without any actual notice or advice to the inmate that his release from that status has ever been considered.

Disposition

The specific grievance of Mr. Drummond is without merit and is dismissed.

The Commission, however, recommends that the records of the institution should affirmatively reflect that the inmate is advised in each instance of the fact that a hearing in his case has been held and that he has been advised of the outcome and result of that hearing.

This 8th day of January 1974.

JAMES G. BOSS,
Chairman

RALPH S. FALCONER,
Commissioner

E. A. FULTON,
Commissioner

MACEO M. WILLIAMS,
Commissioner

DEPARTMENT OF
PUBLIC SAFETY AND CORRECTIONAL SERVICES

The Order of the Inmate Grievance Commission is affirmed.

This 21st day of January, 1974

ROBERT J. LALLY,
Secretary.

(1) *In the United States District Court*
For the District of Maryland

Civil No. 73-1025-M

John Washington,
Plaintiff,

v.

Dr. Harold M. Boslow, et al.,
Defendants.

Deposition of ROBERT J. LALLY, taken on Thursday, February 28, 1974, at 3:15 p.m., at Suiter 500, Executive Plaza One, Hunt Valley, Maryland, before Andrew A. Castiglione, Notary Public.

Appearances:

Charles F. Morgan, Esquire
On behalf of the Plaintiff

Donald R. Stutman, Assistant Attorney General
On behalf of the Defendants

Reported by:
A.A. Castiglione

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(2) STIPULATIONS

It is stipulated and agreed by and between counsel for the respective parties that the reading and signing of this deposition by the witness is hereby waived.

It is further stipulated and agreed that the filing of this deposition with the Clerk of Court is hereby waived.

ROBERT J. LALLY,

called for examination by the Plaintiff, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

EXAMINATION

By Mr. Morgan:

Q. Colonel Lally, my name is Charles F. Morgan and I'm representing a prisoner at Patuxent Institution whose name is John Washington, and I suppose Mr. Stutman has filled you in on the background of the case, but let me state briefly what the case is about.

Mr. Washington filed a complaint in Federal Court alleging that a doctor at Patuxent Institution had given him inadequate medical treatment and, as a result, (3) he, Washington, suffered a permanent disability and he filed a complaint for damages in the Civil Court, under the Civil Rights Act, and the State has filed a motion to dismiss based primarily on the ground that Washington has never before brought this particular complaint to the attention of the Inmate Grievance Commission and for that reason the Federal Court should dismiss his complaint and require him to exhaust this available State administrative remedy. The Plaintiff, and I on his behalf, is opposing that motion and we're saying in this particular case we should not be required to bring the case before the Inmate Grievance Commission and, in order to adequately oppose the motion to dismiss, it is necessary, and I think Mr. Stutman would agree, to develop some information about how the Inmate Grievance Commission works, and obviously, because you are an integral part of the Inmate Grievance Commission, at least in one part of the function of the Inmate Grievance Commission, this deposition becomes necessary, to ask you what your role is, how you function in connection with the Inmate Grievance Commission and some other things. I think this deposition will probably be (4) very short, and it is directed primarily to the Inmate Grievance Commission.

I think, however, we should start by your stating for the record exactly what your position is, how the Secretary of the Department of Public Safety and Correctional Services relates to the Governor and the Division of Correction, Patuxent Institution and Inmate Grievance Commission. A. My authority stems from Article 41 of the Annotated Code of Maryland. Under that statutory authority, I have been appointed by the Governor as Secretary of Public Safety and Correctional Services.

The Statute specifies the agencies that are comprised within this department. One of those is the Inmate Grievance Commission.

Q. The Division of Correction and Patuxent Institution are also within the department, is that correct? A. That's correct, among others.

Q. All right, sir. In broad terms, what is your role vis a vis the Division of Correction and Patuxent Institution? (5) A. The Statute defines in broad general terms the authority of the Secretary over the various agencies comprising the Department. In general terms, they give authority to the Secretary as to the administration of the respective agencies in the area of budget, planning, approval of appointments, approval of rules and regulations and so forth. The Statute does not provide for the operation of the individual agencies comprising the department. These are spelled out in other areas of the Annotated Code of Maryland giving specific authority to the heads of the respective institutions.

Q. And that role or those functions that you described are your relationship to the Division of Correction and Patuxent and the Inmate Grievance Commission, I assume? A. Yes. Each of the individual heads have their specific authority subject to the control and/or approval of the Secretary.

Q. Now, sir, going to the Grievance Commission specifically, I would like to ask you a few specific questions concerning the extent of your involvement with the operation of the Grievance Commission.

(6) First of all, are you involved in anyway in the day-to-day operation or the day-to-day management of the Commission? A. Not as such, no. I want to emphasize the words day-to-day. Their overall performance, their budgetary necessities, this is over and aside from those complaints that they hear and find meritorious that come to me for final action.

Q. What is the extent of your personal contacts with members of the Commission, either the Commissioners themselves or Mr. Lusby or any of the staff? A. It's purely on an official administrative basis.

Q. In what circumstances and official administrative bases do you come in contact with them? A. Personnel problems, administrative problems, budgetary problems. Initially, of course, in the formation of the rules and regulations of the Commission when it was first started in 1971, but less and less after they once were established. The role now is more in an administrative capacity, insofar as personnel needs, budgetary needs, as we do in any state agency, as we're compelled to do.

(7) Q. Do you have what could loosely be called staff meetings with the Commissioners and Mr. Lusby? A. We have a meeting once a month with all of our agency heads, following the cabinet meeting to convey to them questions of policy, problems of concern of the administration of the State generally. These are then conveyed to the agency heads, including the Director of the Inmate Grievance Commission, Superintendent of the State Police. All of the agency heads are represented at this monthly staff meeting and they will generally follow the day after the cabinet meeting.

Q. So I guess that could be loosely described as a situation where the agency heads come to you for a staff meeting which is directed by you, I assume. Are there any circumstances where you would go to the individual agencies for the purpose of a meeting? A. Oh, yes, there could be.

Q. With the Grievance Commission, does this happen? A. I haven't had any meetings with the Inmate Grievance Commission, I daresay, now, in three or four

months and that was over personnel and budgetary problems.

(8) Q. You mentioned rules and regulations. As far as the Grievance Commission goes, when were the rules that are now in effect adopted? A. Sometime subsequent to the passage of the Act, which was July 1, '71. I would have to guess at this. I daresay the latter part of '71 or early part of '72.

Q. You, I'm sure, are familiar with the provisions of the Maryland Administrative Procedure Act? A. Yes, generally.

Q. I am wondering if the rules and regulations of the Inmate Grievance Commission were promulgated under that act and was the act complied with when— A. No, they were not promulgated under that act. They were promulgated in conformity with that act, I presume. They were promulgated with response to Article 41, Section 204 (F), which gave the statutory authority for the promulgation of the rules of the Commission. They were reviewed by the Attorney General's Office for legal sufficiency.

Q. Is it your opinion, Secretary Lally, that the Inmate Grievance Commission is governed by the provisions (9) of the Administrative Procedure Act? A. In what way?

Q. Well, for example, the Administrative Procedure Act obviously contains a lot of things, but in general, it talks about the procedures that an agency has to go through when it implements rules and regulations, the various procedures it should use when it's dealing with contested cases, the procedures concerning appeals from contested cases. A. I haven't compared it in that light, but I would dare say in a general way that anything in the rules and regulations of the Inmate Grievance Commission would conform and not conflict with the Administrative Procedures Act, unless the enabling legislation, Article 41, 204 (F) specifically said otherwise.

Q. What is your involvement with the Grievance Commission, Secretary Lally, concerning the making of

policy of the Commission? A. I don't make any policy in the Commission, insofar as their rulings on grievances are concerned, except to insure that they don't become involved in what I would (10) term purely legal questions. For example, if an inmate complains that he was eligible for parole or he was not guilty in his original trial, these are purely legal questions that remain in the prerogative of the court. Other than directions such as this, I do not direct the Commission whatsoever in their decisions or their hearings.

Q. Have you ever imposed any kind of restrictions on what the Commission can by subject matter deal with, other than what is in the Statute? A. If you would be more specific, I could—

Q. For example — and I'm not thinking of anything in particular, I am asking a general question, have you ever told the Commission, for example, that as a matter of policy they should not consider cases raised by inmates concerning mistreatment by guards or— A. Never.

Q. Or conditions on a certain tier— A. Never.

Q. Now, I'm not talking about these specifics, but using those as examples— A. In othe. words, have I limited their jurisdiction (11) beyond what the law permits?

Q. I think you are saying it better than I. A. No.

Q. One of the roles that you play, as I understand it from the Statute and from Mr. Lusby, Secretary Lally, is that after reviewing the decisions of the Grievance Commission and, as I understand it, only the ones where the Commission finds the complaint to be meritorious, in favor of the inmate, do you review? A. That's correct.

Q. That's correct? A. I have no statutory authority, if they find on initial review the complaint is not wholly meritorious, they have the authority, either the Commission themselves or they can delegate it to the Executive Director to dismiss it, if they find on initial review that it is not meritorious. My role only begins after the Commission has conducted a hearing and

found that the complaint is in part or wholly meritorious.

Q. What is your role at that time? A. Then I, under the law, must either affirm, (12) modify or reverse the order of the Commission and the Statute specifically also says that I may take whatever other action I deem necessary.

Q. Does the Statute impose any kind of time restriction on you with regard to that? A. Yes. It requires that 15 days after the receipt of the order of the Commission, that I must submit my order.

Q. Is it your habit, Secretary, to act within 15 days? A. Usually, yes, unless some unusual circumstances prevail.

Q. You mentioned you take whatever other action you deem appropriate— A. This is what the Statute says.

Q. Yes, sir, I've got the Statute here and I was going to ask you a direct question about it. The Statute states first that within 15 days of the receipt of such an order, the Secretary by order shall affirm the order of the Commission or shall reverse or modify the order where he disagrees with the findings and the conclusions of the (13) Commission and that's what you testified to? A. Then the next sentence—

Q. The next sentence is the Secretary shall order that the appropriate official of the institution in question accept in whole or in part the recommendation of the Commission, and I assume that you do that? A. Yes.

Q. And then there is an "or," and it says, or the Secretary may take whatever action he deems appropriate in light of the Commission's findings. How do you interpret that particular phrase, take whatever action he deems appropriate in light of the Commission's findings, and under what circumstances have you used that phrase to take action and what action have you taken? A. Well, generally, the way I apply that is to write my opinions or my orders in conformity with that language. In other words, if the Commission should

make an erroneous decision, then as I read the law, it's up to me to reverse, modify or affirm the order.

Q. What I am directing my question to now, however, is the second sentence and it seems to be — the Statute (14) seems to read that within 15 days of receiving such an order, the Secretary has to do one of those three things, reverse, modify or affirm? A. Hypothetically, let us say the order imposed upon a correctional agency an action that was either legally impossible or fiscally impossible for them to implement—

Q. Fiscally? A. F-i-s-c-a-l-l-y, or legally impossible for them to comply with, in other words, if the law says Patuxent must do so and so, and the Inmate Grievance Commission order is contrary to that or if the fiscal restraints of the budget which was passed by our legislature and provides X-number of dollars and there is something in conflict with that, this is when I would have to invoke whatever action I deem necessary.

Q. What action would that be, in that circumstance? A. It could be as broad as your imagination.

Q. Wouldn't it be limited to either reversing or modifying the order of the Commission? (15) A. Usually, yes, but there could be exceptions.

Q. What exceptions specifically are you thinking of? A. I don't have any in mind, but I visualize that there might be some.

Q. Well, let me ask you one other question about that phrase. A. I can give you a hypothetical situation. Suppose they should order that they provide a swimming pool, and if I knew the budget didn't provide for fiscal funds to build a swimming pool, I think I would have to disagree with it.

Q. And you would reverse it? A. If that were the order and I knew it was fiscally impossible, I think I would have to reverse it.

Q. So that really isn't an example that fits into the category of take whatever action you deem appropriate, because that's a reversal. That is one of the things that

is enumerated. That is what I'm getting at. What falls into the category of things you would do besides affirming, reversing or modifying? A. I think only in those areas where, from my knowledge of the capability of the agency involved, whether (16) it is Patuxent or Corrections, that I would know it couldn't be accomplished within a certain time — let us say, for example, it involved training of correctional officers, and I know the training cannot be given until, say next September and assuming the order says it had to be done for forthwith, something of that type, I would have to take whatever action is necessary and modify the order.

Q. I see. A. There are a host of things that are knowledgeable to me as Secretary affecting our agencies that the Inmate Grievance Commission itself is not aware of. So that I think that this phrase is meant for that purpose.

Q. When you review a decision of the Commission, Secretary, what papers do you actually have before you? A. I have the order of the Commission which includes the findings of fact, conclusions, in effect, the Inmate Grievance Commission order.

Q. Do you typically have the tape recording of the hearing? A. No.

Q. Have you ever had opportunity to ask for one? (17) A. No.

Q. Do you typically have the whole file from the Commission? A. No, never. However, there are occasions where the findings of fact or the statements contained in the order are so meager, that I have sent them back for a rehearing.

Q. Is that one of the things — well, when you send a case back for a rehearing, do you sign a formal order and say, I hereby reverse or modify to the extent of holding a rehearing, or do you just send an informal kind of— A. No, that would be done administratively, like going to the Director and saying there aren't enough facts to decide the thing and expand on it.

Q. And you would ask them to hold another hearing? A. Either hold another hearing or extend the hearing or obtain the facts that I may need.

Q. Would you ask them then to rewrite the order? A. No.

Q. Well, wouldn't the purpose of it be so — wouldn't the purpose of the hearing be to have the order (18) rewritten so it would be in a form that you could rule on? A. No. The purpose — the only purpose I've ever had, and I can only think of one or two occasions where this happened, where the facts were so meager, you couldn't make a decision. In effect, it would be a remand by modification.

Q. Yes, I see that. Then that would fall into, "or take whatever action you deem appropriate," I guess? A. Yes. This could work either way, either in favor of the institution or in favor of the inmate.

Q. Certainly. If you ask that a case be remanded, the Grievance Commission, would they hold another hearing? A. I would presume they would.

Q. And, after the hearing they would write another order, wouldn't they? A. It wouldn't necessarily change the order. They would add to the findings of fact, I would hope so, so I could make a decision.

Q. I think we're talking about the same thing, but talking— A. In the order there is a set of conclusions which (19) in effect is an order. The findings of fact are a recital of what they found in the hearing.

Q. What you are saying is the disposition could be the same, but the second time it comes to you, there would be a longer set of facts and you could rule on the disposition? A. Yes.

Q. Has there ever been an occasion when you sent an opinion back to the Grievance Commission and asked them not necessarily to gather new facts about the case, but to rewrite the opinion because you don't feel that the opinion — you don't feel that the disposition matches the facts? A. I can't recall any. It's conceivable that this might have happened in the very early

stages of the Commission when they were very inexperienced with the statutory requirements. However, I don't recall even then, but it could have happened. I couldn't say unequivocally.

Q. During the course of time that you have a case before you for review, has there ever been an occasion when you consulted with either Mr. Lusby or any member of the Commission about the case? (20) A. A particular case?

Q. A particular case. A. Not to my recollection. Wait a minute. There was one over the claw, the use of the claws, and I may have talked to him about that. It's a restraining device they used in Corrections some months back, which was heard by the Grievance Commission.

Q. In that particular case, after their order came to you for review, you talked to Commission members about it? A. That's the only case that I can recall. I'm not even positive about that.

Q. But, just in that one case, at the outside? A. This is the only one that comes to mind.

Q. Secretary Lally, what standards do you use when you are reviewing a decision of the Commission? A. What standards?

Q. Yes, sir. A. I think I call upon my own legal knowledge and legal training, my own professional training, my own administrative knowledge of the agencies that comprise this (21) department. That generally is what — is that what you have in mind?

Q. I think so, yes, guidelines or standards that you use. I assume none of those are written down anywhere? A. No, not unless you extract them from my brain.

Q. Have you ever delegated the authority to review an order to someone under you? A. Yes, for a short period of time I had two deputy secretaries. One is the Deputy Secretary for Correctional Services, the other is Deputy Secretary for Public Safety. For a short period of time, I had a Deputy Secretary of Correctional

Services, preliminary reviewing the Inmate Grievance Commission orders, but that was, I daresay, no more than a two-month period. Except for that period, I do it all myself personally. I don't staff it out to anyone.

Q. And your present policy and future policy is to do it all yourself? A. It would depend on the time and availability of the new Deputy Secretary for Correctional Services. I can't say at this point in time whether he would or wouldn't, (22) but the statutory authority is mine, not his.

Q. Is it your practice, Secretary Lally, before issuing what would be the final order in the case, your order, have you ever issued a proposed order to both parties, either/or both parties, for their comment and then issue your final order? A. I have never issued a proposed order. I draft my order and send it to the Division of Corrections, as a matter of policy, or it could be Patuxent, for that matter, because those are the only two agencies that are involved under the Inmate Grievance Commission Act. As a matter of policy, I send it to the head of the Division of Corrections or Patuxent, giving them a two or three day period to respond to it, before I issue the final order.

Q. Is what they receive at that time a signed order by you or a proposed order? A. It's a draft, I would say, of what I intend to make as my one and only final order.

Q. It's a draft of a final order and is it signed by you? A. It could be.

(23) Q. Well, is it usually, or does that vary? What is your practice on that? A. I'd say, with the volume that comes across here, most of them are probably signed.

Q. And what happens at the end of the three-day period, if, for example, either the Commissioner of Corrections or Director of Patuxent has not communicated with you about the order, what happens then? A. Then it becomes final. The agency then has 30 days to respond to me, advising me what action they have taken in response to the order.

Q. Thirty days to advise you of their compliance, in other words? A. That's correct.

Q. At the end of the three-day period, I assume at the end of the three-day period, the inmate or whoever is the complaining person would get a copy of your order, is that right? A. As soon as the order is finalized, the inmate under the law is given a copy by mail.

Q. Is the inmate given a copy at the same time the (24) Commissioner or the Director of Patuxent is given a copy? A. When there is a draft copy, no. The only time an inmate gets a copy is when the order is final.

Q. Is there a draft copy issued in every case? A. Yes.

Q. And that draft copy doesn't become final until three days after it's signed, is that right? A. As a matter of practice. There could be some exceptions to this.

Q. And, on the third day, the inmate gets a copy of it, because at that point the draft copy becomes a final copy? A. No. The third day the copy would be mailed to the inmate. I don't know whether he would get it—

Q. He would get it in four days or five days. Is that done in your office or is it done out of your office? A. It's done out of my office.

Q. What happens, Secretary Lally, if a comment comes back from the Division of Correction or Patuxent after the three-day period taking some objection to your ruling, which by that time has become final? What is your (25) practice then? A. I would weigh whatever they had to say and take it into account when I drafted the final order.

Q. Well, at that point the order would be final, as I understand your testimony. A. No. I said it's a matter of practice.

Q. Yes. A. You asked what would happen if it was after three days.

Q. Right. A. This could be an exception to the practice or it could be within the three days, for that matter.

Q. What practice are you referring to? A. My practice is to send a draft copy of the inmate grievance

order that I intend to write to the involved agency, Patuxent or the Division of Corrections, and I say, as a matter of practice, I give them three days to respond, but there could be exceptions to that general practice.

Q. What would be the exceptions? That they would be given more time to respond? A. Anything could happen, or the Commissioner (26) himself may be ill, he might be involved in a riot. I can envision all sorts of circumstances where they may not be able to respond. They may call me and say, the three days are up, I haven't had a chance to get to it, I'll get it in as soon as I can.

Q. I think the problem I'm having in understanding the practice, and let me ask you a question and maybe it will be cleared up. I am not sure at what point an order becomes final. As I read the Statute— A. I think it should be made clear that there is not a combination of orders. There is one order in each and every Inmate Grievance Commission consideration.

Q. Which is that? A. The one order that is finally released.

Q. That's the final order? A. That's right.

Q. Is it your interpretation of the Statute that the final order has to be issued within 15 days of the time you receive the Grievance Commission's recommendation? A. That's what the law says, yes.

Q. Okay. And you said it was your practice to (27) comply with the law and, in most cases, I think you said almost all cases, the final order is issued by you within 15 days? A. Usually.

Q. Right. Now, my question is if you send what you call a draft order to either Mr. Jordan or Dr. Boslow and ask for their comments on the order, when does that order become final? When does it become the final order? A. At the time I mail it to the inmate.

Q. And that would be three days after? A. Usually.

Q. Usually three days after. What is the purpose of that three-day period, Secretary Lally? A. I don't pretend to know all of the problems of the institution

and I have often found in the findings of fact that the person representing the institution is not always knowledgeable of the total problems of the institution, and I don't have sufficient facts to make a final decision on it.

Q. And so that three-day period is for what? A. Looking for sufficient facts upon which I could (28) make an intelligent decision on the order.

Q. Okay. Suppose, in a hypothetical case, you send a draft order to either Mr. Jordan or Dr. Boslow and say within the three-day period either one of those people calls you on the phone or sends you a letter and says, I think that your proposed draft — I think your proposed order is wrong because the facts as I see them are thus and so, and your conclusion therefore should be this, rather than that. What would you do with that response? A. I would weigh it.

Q. Against what? A. Against the facts in the order.

Q. And if you found that the response you got back from Mr. Jordan or Dr. Boslow outweighed what the finding of the Commission was, then that would be reflected in your final order? A. In this hypothetical situation, it might be necessary to remand it to the Commission for the taking of testimony on the particular point raised by the agency head.

Q. Would you always remand it or not? (29) A. It would depend on what issue was raised.

Q. Well, why don't we talk specifically about the case that I think probably you have some knowledge about already and that's the Curtis Midgett case, which I think Mr. Frankel asked you to submit an affidavit to the court, in the Ernest Minnick case, and in that particular case, if I may represent to you what I believe the facts to be, on March 21, 1973, you sent a letter to Mr. Jordan saying, "Enclosed is a copy of the order resulting from Inmate Grievance Commission's hearing of the complaints of Midgett, Minnick, and Minnick. They will be sent a copy of this order in three days. Let me know in writing within 30 days what specific action has been taken in compliance with this order," and this

letter is what you testified today, it's a three-day period before the inmate gets his copy and 30-day compliance. A. Yes.

Q. And attached to that was the Inmate Grievance Commission's recommendation dated March 7, 1973, and your order stating, the order of the Inmate Grievance Commission is affirmed this 20th day of March, 1973, signed by you, signed 13 days after the Commission's recommendation.

(30) Subsequently, on April 2, Mr. Jordan sent a letter, a three-page letter to you concerning this case and detailing point by point what his objections were to the Grievance Commission's order which you had affirmed on March 20th. Subsequent to that, on April 6, you sent another letter to Mr. Jordan stating, "Enclosed is a copy of the revised order in connection with the Inmate Grievance Commission's hearing in the complaint of Midgett, Minnick, and Minnick," and attached to that was a Xeroxed order signed by you, also dated March 20, 1973, which in substance — well, at the very least, it modifies substantially the original recommendation of the Grievance Commission. It is prefaced by the paragraph, "The order of the Inmate Grievance Commission is modified as reflected hereinafter." And then later, that second order was sent by Mr. Jordan to the Penitentiary.

My question with regard to that series of communications and that action taken on your part is this: Isn't it true that the information that you received from Mr. Jordan in this case substantially after the 15 day period had passed, but more importantly, the information (31) that you received from Mr. Jordan concerning this complaint, the facts which underlay the complaint, Mr. Jordan's opinion with regard to the facts and his objection with regard to the Grievance Commission's recommendation, which you on March 20th, had affirmed, or at least proposed to affirm, isn't it true that the letter that Mr. Jordan sent you caused you to substantially change what your opinion was, substantially change your final order? A. No, it is not true, the way you put it.

Q. Well, could you explain how it's not true? A. Well, first of all, the order, the final order and the only order in that case granted the same relief that would have been granted if the order had been affirmed as originally drafted. Secondly, there were unusual circumstances in connection with the facts in that case that intervened from the time of the hearing and to the time of my final order, namely a riot at the Penitentiary, which had a great and detailed bearing on the action to be required by the Division of Corrections in compliance of the order, in that a great deal of their facilities were ruined and burned, the staff was seriously strained and there were (32) many changed circumstances that had occurred that are not reflected in Mr. Jordan's letter nor reflected in the Inmate Grievance Commission's findings of the facts.

Q. So, in summary, what was the reason that the second — well, first of all, let me ask this. The second order that you signed your name to, and I use order in quotes, because I don't want— A. As I recall that order, that last paragraph of the order specifically concurred with the order of the Inmate Grievance Commission and ordered the Division of Corrections to do everything physically possible to provide the physical comforts of the complaining inmates.

Q. Well, that's true. It says the Division of Correction is ordered to continue every reasonable effort to improve the physical conditions of all inmates, I think, confined to the Penitentiary. A. As I recall, I also mentioned that there was physical problems involved, that the physical facilities at the Penitentiary, where the reception diagnostic center is housed was old and antiquated and we were then currently considering a new facility and had the request of the General (33) Assembly for funds for such a facility which would alleviate the very problem the inmates were complaining about. This fact was not brought forth in the Commission hearing.

Q. Let me ask you one procedural question about the second document to which you affixed your signature in this particular case. It's dated March 20, 1973, but that

in fact was not signed on March 20, is that right? A. That's right.

Q. Do you know when it was signed? A. I believe it was about April — sometime between April 2 and April 6.

Q. Well, your letter to Mr. Jordan was April 6. So I assume it would be around that period of time. And the reason, as I understand it, that it became necessary to change your proposed affirmance of the Grievance Commission's order to this rather lengthy modification of the Grievance Commission order was, first, changed conditions at the Penitentiary as a result of a riot, is that right? A. That's one of the factors, yes.

Q. What were the other factors? A. Some of the things pointed out in Mr. Jordan's (34) letter.

Q. Anything else? A. I'm not sure, at this point in time. It might well have had something to do with the budgetary hearings we had being before the Capital Budget and Improvement of the Penitentiary — maximum security — it's not called Penitentiary. It's called maximum security facility.

Q. Let me just ask one other question concerning this particular case and that is, is it your position that the final order in this case, the one that was signed April 6 or so — April 5, whatever — of 1973, does not substantially change the relief that was granted originally by the Commission? A. Yes. As I recall, the issue in this particular case was the inmates were in protective custody. Their complaints were that being confined in protective custody, they were not given all of the amenities that they would have in general population. Therefore, the decision as to whether they remain in protective custody was within the prerogatives of the inmates, in that simply by signing a waiver, they could remove themselves from those conditions. (35) Granted, they could then expose themselves to whatever the problems were in the general population, but the conditions which they complained of, namely the lack of showers and other physical deprivations as they alleged, could have been corrected

or was within their power to correct simply by removing themselves from that status.

Q. And the effect of your final order was to notify them of that? A. It was included in the order, I believe, or at least, I made reference to that.

Q. What I was getting to, when I asked that question was I believe you said in your last sentence of the April 4th or 5th order was that the Division of Correction is ordered to continue every reasonable effort to improve the physical conditions of the inmates confined to the Penitentiary? A. There was a reason for that. I recognized that even though those inmates were in protective custody, they were still entitled to the provisions of human needs and certainly the order implied and directed the Division of Corrections to insure that those human needs were provided.

(36) Q. Yes, sir. Isn't it true that the order that you finally affixed your signature to here modified the recommendations of the Inmate Grievance Commission as to the extent of making it unnecessary for the Penitentiary to comply with the specific recommendations made by the Grievance Commission, but instead made it mandatory on the Penitentiary to in general make conditions improved, as you say, the physical conditions? A. I think I would agree with you, it gave the Division of Corrections and Penitentiary more latitude on how they provided these amenities. Whereas, the Inamte Grievance Commission order narrowed their opportunity to provide these amenities.

Q. The Commission order in 6 or 7 instances stated specifically what those particular complaining inmates should have, for example, No. 1, protective custody inmates be given two showers a week. No. 2 was reasonable efforts be made to permit protective custody inmates to receive visitors in the general visiting area, No. 3, inmates under protective custody should be given exercise daily, No. 4, inmates under protective custody be given work assignments (37) and, 5 and 6 are similar in other areas; and my question is isn't the effect of your final order in the case to modify the

Grievance Commission's order to the extent of removing the burden from the Penitentiary of providing these specific forms of relief and, instead, placing the burden on them of generally improving the conditions of all inmates in the Penitentiary? A. I think that's correct.

Q. All right, sir. I hesitate to use this particular case as an example, because it's in litigation in another matter and so I won't, but what I am interested in finding out, apart from that case, is that when you communicate with Mr. Jordan or Dr. Boslow about a case that has come to you from the Grievance Commission, do you inform the inmate that this communication is taking place and do you advise the inmate before you sign your final order that you have received certain recommendations or objections from Dr. Boslow or Mr. Jordan and finally give the inmate the opportunity to respond to those objections before you sign your final order? A. No, I do not. I explicitly conform to the (38) Statute which provides that the inmate be provided with a copy of the order, which is done.

Q. The order itself? A. That's correct.

Q. Then isn't it fair to say that on some occasions, and specifically in the Midgett, Minnick case, you received facts and objections and conclusions from, in that case, Mr. Jordan and they were — you used those facts, objections and conclusions in your final order, but the inmates who were affected by the final order never knew that those objections, facts and conclusions had ever been brought to your attention, is that right? A. If you mean I didn't volunteer it to them, the answer is yes. If they had asked me, I presume I would tell them why.

Q. Let me ask you that same question again, Secretary Lally, with a slight modification, that is, if the inmate had counsel, would you treat the case the same way? You still wouldn't volunteer that information to the counsel, is that right? A. The availability of counsel would have no effect, (39) one way or the other.

Q. Have there been any other cases, Secretary Lally, besides the Midgett, Minnick case where you received correspondence based on your draft order from either Mr. Jordan or Dr. Boslow which has caused you to modify or in some way change your draft order? A. I imagine there have been some.

Q. There have been or have not? A. I imagine there has been.

Q. I notice, by the way, in your draft order or on your draft order — and I use draft order, because it's your term, in quotes — in your draft order in the Midgett and Minnick case was your signature, and I believe earlier in the deposition you testified that on occasion you send the proposed draft order to Mr. Jordan or Dr. Boslow without your signature, is that right? A. No, I think in almost every case I would affix my signature, and this is a matter of expediency.

Q. It goes with your signature? A. Yes, which would reduce the administrative flow of paperwork. There may be exceptions to that, but (40) I would say, as a general practice, I sign them.

Q. And, when the order is received, the proposed draft order is received by Dr. Boslow or Mr. Jordan, it's their understanding, I assume, that they have three days in which to make some kind of statement to you if they have a statement to make? A. Yes. In fact, they are explicitly told in the letter that the inmate will not be given a copy of the order until three days hence.

Q. And their understanding and your understanding of that three-day period, as I take it, is that that is a three-day period in which they have an opportunity to respond to you about the order? A. That's correct.

Q. Okay. And, as in the Midgett case, because of extenuating circumstances, whatever they may have been— A. I might explain that the reason for this is that the institutional head generally is not knowledgeable of the particular order or the facts in the order and this gives him an opportunity for the first time to have the thing brought to his attention. So that I feel, in (41) fairness to the administration head, he should

have knowledge of this and have an opportunity to respond to it.

Q. That gives him a chance to present some evidence to you before the order actually becomes final? A. At least, to analyze what the problem is or correct it, if necessary, and even begin to correct it before the final order comes to him.

Q. And, as in the case of the Midgett and Minnick case, the three-day period, because of extenuating circumstances, as I understand it, can be extended, so that even if Mr. Jordan, in the Midgett case, doesn't respond within three days, he may at some later time respond and you still may take his response into consideration in changing the order, is that right? A. With some limitation. It couldn't go on ad infinitum. There certainly would have to be some time limit.

Q. That's a difficult question and I was going to refrain from asking you, but since you bring it up, what would you think would be the time limitation Dr. Boslow or Mr. Jordan would have to object to some order they received?

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April 2, 1974

Charles F. Morgan, Esq.
Legal Aid Bureau, Inc.
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Re: Washington v. Boslow

Dear Mr. Morgan:

Secretary Lally has reviewed his deposition and has informed me that the same contains two errors on page 42, that is, on lines 3 and 7 the word "tape" should be "tickler".

Would you kindly make corrections accordingly.

Very truly yours,

DONALD R. STUTMAN,
Assistant Attorney General.

DRS/lah

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(42) A. I'd say normally, if I don't receive an answer by 30 days, they would be getting a telephone call from me, because I keep a tape on every one I send them to remind me that it has been sent and I'm waiting for a reply.

Q. Well, at the end of 30 days, you would call and ask them if the order has been complied with? A. I keep a tape on it and it accomplishes both purposes.

Q. I see. A. There is also an additional problem. The Inmate Grievance Commission wants to know whether their order has been complied with. So when I receive a response from the agency head, I send a copy of that to the Inmate Grievance Commission, so they know the order has been complied with or what action is taken.

They haven't been made aware of it yet, so they would know when they get a copy of the reply from the agency head and they in turn would be aware of whether the order was complied with or not.

Q. Suppose at the end of the thirty-day period, you talk to either Mr. Jordan or Dr. Boslow on the phone and say, No. 1, I haven't heard anything from you about any (43) comments you have about this order and, No. 2, I'm assuming it's being complied with, and Mr. Jordan says, well, in fact, I do have some comments about them, here they are, or I'll send them to you in a letter and you will have it tomorrow, and you receive those comments and they are of the nature that would cause you to change your order; would you then change it? A. It would be a highly unusual circumstance. I think I would tell them, sorry, you are a little late.

Q. So you would say thirty days is kind of a cut-off, thirty-three days? A. Usually, but unless there would be some circumstances, that I can't imagine at this time, but I think that would be a reasonable time to respond.

Q. Secretary Lally, what else, if anything, do you do besides sending the letter with the order and the follow-up 30-day phone call to assure compliance with orders? I'm not saying that isn't enough, but do you have to do anything else? A. There could be occasions where I may have to involve other agencies to provide whatever the order (44) encompasses. For example, if it's a matter of providing training to their personnel, I would have to check with the Correctional Training Commissio. , the Executive Director of that Commission, to see whether or not their staff is equipped to implement the training that is recommended. There could be a security matter involving expertise of the State Police I might have to check with the State Police, which is also one of our agencies, to see whether or not — so it's not beyond imagination that I would have to consult with other people to make sure it can be implemented, and it could come up at various staff conferences with them on a variety of things, such as personnel matters or budgetary matters.

Q. Have there been cases you can recall where there has been a refusal on the part of whoever the person is to comply to in fact comply? A. The only indication I get of that type of thing is occasionally I'll get a letter from an inmate where he will infer that he's being harassed because of the inmate grievance procedure. In those cases, I'll respond to the inmate and request a report from the agency involved.

(45) Q. But that's a little different than compliance. You have never had any occasions, I take it, when there has been a refusal on the part of any institution employees or officials to comply with any order? A. I have letters from inmates contending that, specifically Mr. Minnick, who is a pretty good letter writer, prolific letter writer. Each and every one of those are checked to find out whether the allegation is valid or not.

Q. Who does that checking? A. I, personally, and my secretary.

Q. You would call the person in the institution who is supposed to be complying who is alleged not to be? A. I would call Commissioner Jordan, if it's the Division of Corrections, or his executive assistant, Miss Mercedes Stevens, and ask him what happened and have him check into it or have her check into it.

Q. Have you ever had to occasionally discipline an employee or official of the Division of Correction or Patuxent for not complying? A. Thankfully, no.

Q. Discipline in any way, for not complying? (46) A. It hasn't happende yet, but I wouldn't hesitate to do so.

Q. Along those lines, have you ever found it necessary to discipline, again from a reprimand up to a discharge, any employee or official of the Division of Correction or Patuxent, as a result of a recommendation by the Grievance Commission? A. I'm not sure if the Hagerstown allegations, where the guards there were charged with physical abuse against the inmates, I don't know whether that came before the Commission or not, but that was an instance where disciplinary action was taken against personnel. However, my

recollection of that was it was not an outgrowth of a recommendation of the Inmate Grievance Commission, but an example of discipline.

Q. Was that mistreatment by a guard? A. There was a riot at Hagerstown several years back, where a report came to me then from the then Commissioner of Corrections, I believe, Cannon, at that time, that he had received information from one of the officials at Hagerstown that the guards after the riot had used undue force against the inmates. That case is now pending in court. So I would (47) rather not elaborate beyond that, but disciplinary action was taken against the guards in that case and I don't recall whether that was before the Commission or not.

Q. I notice in some of the opinions of the Grievance Commission affirmed by you that we had an opportunity to look at downstairs, that on occasion, the recommendation of the Commission grants more than just relief to the person involved. For example, the decision of the Commission may recommend, well, for example, may recommend that the Division of Correction establish a policy to the effect that an inmate who is in segregation may not represent another inmate at an adjustment hearing. I think that was a fairly recent decision made by the Grievance Commission, and I am wondering when those kind of recommendations which then come to you and are affirmed and sent to Mr. Jordan which appear to suggest a new policy on the part of the Division of Correction or on the part of the institution that is involved, in the course of your compliance, your endeavors to insure compliance, do you ask Mr. Jordan or require Mr. Jordan that he send you a copy of a written directive to the effect that this recommendation has been implemented? (48) A. Not usually, unless it's an outgrowth of a specific order.

Q. That's what I mean. I noticed that in some cases the Inmate Grievance Commission will make a general recommendation as well as make an order in a specific case. A. If it's contained within the order, yes, I would. If it's not contained within the order, this will happen where the Commission may witness something

in the course of their hearing and they bring it to my attention; for example, if the hearing room where they conducted their hearings were not adequate, where there was a hallway and people would walk through and there was no privacy, something like that, I would bring it to the attention of the Commission of Corrections or the Warden, as the case may be, and try to get it corrected. But I would not require a written letter that it was corrected. So, occasionally, there are administrative recommendations made by the Commission that are not contained within the order itself.

Q. When you say not contained within the order itself, are you referring to that portion— A. That was not at issue.

(49) Q. Are you referring to that portion of the paper received from the Commission entitled, "Disposition"? A. I'm talking about the complete order.

Q. The whole thing? A. The whole thing.

Q. So — let me be sure I understand that at this point. With regard to those recommendations of the Commission that appear to suggest changes in policy, either division-wise or institution-wise, the Division of Correction in your view is not held to implementing that new policy unless that policy was particularly at issue in that Commission hearing, is that right? A. I'm not sure I understand you correctly, but if you are saying if the recommendation is outside of their order and is not an issue in the order — in other words, let us say it's dictum — should the Division of Corrections comply with that dictum?

Q. Yes, that's exactly the question, and amplification of the question is does the fact that you have affirmed the order, including the dictum, bind the Division of Correction to the dictum? (50) A. I would say that they would give appropriate weight to the dictum as they would to any court decision dictum, but the specific compliance must be with the specific order of the IGC.

Q. How does Commissioner Jordan determine — well, what could you do to be sure that Commissioner Jordan

knows what is dicta and what is not dicta in a particular opinion? Do you leave that up to his discretion? A. Well, the way the format of the order is set up, the Inmate Grievance Commission order, that is spelled out specifically by Statute there shall be findings of fact and a conclusion and then the law refers to the order of the Commission. There is no "order" in the order itself. It's only set forth in the conclusions. That, in a sense, is the "order," and everything contained therein, in effect, is the order, and I expect and insist upon specific compliance with everything contained in that conclusion.

Q. In the disposition section? A. Yes, because, as you know, the format of the IGC order doesn't come out as does a court order. In other words, it's not separated, in the format of the thing. So, (51) really, it's only in the disposition.

Q. The disposition is what the "defendants" have to follow, the Division of Correction or Patuxent? A. Definitely, because sometimes the findings of fact and conclusions may recite particular dictum in the conclusions and the conclusions are in a sense the order.

Q. Then if you affirm the recommendation of the Commission in what I notice to be a rather standard way, a one line — I forget the exact wording, but basically it's, "The recommendation of the Commission is hereby affirmed"? A. I generally say the order of the Inmate Grievance Commission is affirmed.

Q. What that means is that the Division of Correction must comply with everything that is under disposition in that order, is that true? A. Depending on how you interpret the Statute.

Q. Well, how do you interpret it? A. I interpret the disposition to be the "order," because the Statute, if we had it here before us, we could review it, but as I recall it, it says that the order of the (52) Inmate Grievance Commission; so the findings of fact, conclusions and disposition, I believe those three general words—

Q. Well, let me ask you one more time to make sure we have it pinned down. It's your feeling that if you

affirm an order, and you said the order of the Grievance Commission is hereby affirmed, that means, in your mind, at least, that the Division of Corrections is to comply with whatever is written in the Grievance Commission's recommendation under the heading disposition? A. Without question, that's the disposition, and it conceivably concerns other parts, but it certainly is as to the disposition.

Q. And anything outside the disposition, in the conclusions and findings of fact, they might put in an extraneous recommendation of some kind, but that is dicta? A. It could be. The Inmate Grievance Commission are not all skilled lawyers or students and sometimes their orders aren't that precise.

Q. But, at the very least, what is in the disposition, and if you affirm an order, all parties can be assured that (53) what you meant to do is to put into practical effect what is in the disposition section? A. At a minimum.

Q. At a minimum, all right, Just one question, Secretary, concerning the subpoena duces tecum which was served on you for this deposition. Point No. 1 is that you should bring with you any and all written rules, regulations, policies, standards, guidelines, procedures or practices which concern the reviewing by the Secretary of the orders or recommendations of the Inmate Grievance Commission and which are presently in effect, and it's my understanding from what you said that the only written rules, procedures or any of these other words I just read off are the Statute itself and the regulations of the Grievance Commission which are in the 12.00 series, is that right? A. That's partially right. I do have written guidelines for all our agencies that are applicable across the board to all of them as to administrative actions that they must submit to us for review and approval. This would be applicable to the Inmate Grievance Commission, as well as any of the other divisions within this department.

(54) Q. They would be general regulations that apply to all— A. Pertaining to budget, personnel practices, use of cars, energy crisis, et cetera, et cetera.

Q. Is there anything else that specifically applies to the Inmate Grievance Commission? A. That specifically applies to the Inmate Grievance Commission, there may be correspondence on individual cases. As far as written direction, data, they all contained within the Statute and the rules and regulation of the Commission itself.

Q. You haven't issued any directives or memoranda or anything along those lines to guide the Commission? A. Not to my recollection.

Q. And you don't have any yourself that guide what we discussed as your function and your role with regard to the Commission? A. Not that I can recall specifically, because it's primarily a matter of conformity with the Statute.

(Mr. Morgan) Thank you, Secretary, I don't believe I have any other questions.

* * * * * *

END OF VOLUME II

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-44

RECEIVED
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SUPREME COURT, U.S.

ROBERT BURRELL, Petitioner,

v.

MILTON McCRAY, Respondent.

SERGEANT V.D. SMITH, Etc., Petitioner,

v.

MILTON McCRAY, Respondent.

GERALD McCLELLAN, ET AL., Petitioners,

v.

JAMES E.X. STOKES, Respondent.

DR. HAROLD M. BOSLOW AND
DR. DOMINGO C. SORONGON, Petitioners,

v.

JOHN WASHINGTON, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Of Counsel

August 27, 1975.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-44

ROBERT BURRELL, Petitioner,

v.

MILTON McCRAY, Respondent.

SERGEANT V.D. SMITH, Etc., Petitioner,

v.

MILTON McCRAY, Respondent.

GERALD McCLELLAN, ET AL., Petitioners,

v.

JAMES E.X. STOKES, Respondent.

DR. HAROLD M. BOSLOW AND
DR. DOMINGO C. SORONGON, Petitioners,

v.

JOHN WASHINGTON, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported as McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975) (en banc).

QUESTIONS PRESENTED FOR REVIEW

I. Whether a Maryland prisoner who alleges violations of his constitutional rights arising out of his imprisonment may be

required to exhaust state administrative remedies before being permitted to proceed in federal court under 42 U.S.C. § 1983.

II. Whether the Eighth and Fourteenth Amendment rights of Respondent McCray were violated by Petitioners Burrell and Smith when they subjected McCray to isolation in a "strip cell" under severe and harsh conditions of confinement for a period of two days.

STATEMENT OF THE CASES

A. Burrell v. McCray and Smith v. McCray

On January 19, 1972, Milton McCray, a state prisoner at the Maryland Penitentiary in Baltimore, filed a pro se complaint in the United States District Court for the District of Maryland under 42 U.S.C. § 1983 claiming that his constitutional rights had been violated by a prison guard, Robert Burrell, when he, McCray, was locked in an isolation cell and subjected to inhumane conditions of confinement. On February 9, 1972, McCray filed a supplemental pro se pleading.

On March 7, 1972, McCray filed another pro se civil rights complaint against Bernard D. Smith, alleging that Smith, a guard at the Penitentiary, had subjected McCray to a deprivation of his constitutional rights by arbitrarily confining McCray in an isolation cell under excessively harsh conditions. The complaint against Smith was unrelated to the complaint McCray had previously filed against Burrell.

Counsel was appointed to represent McCray in both cases on about March 16, 1972, and by agreement of all counsel and the District Court, the cases were consolidated. The defendants below filed, through counsel, on May 1, 1972, a joint motion to dismiss each case, principally on the ground that McCray had failed to exhaust an available state administrative remedy by not petitioning the Maryland Inmate Grievance Commission for relief

before filing his complaints in federal court.

On June 11, 1973, the defendants' motion to dismiss was heard before the Honorable Edward S. Northrop. The parties submitted evidence concerning the adequacy of the Inmate Grievance Commission as a state administrative remedy for the purpose of exhaustion, and the Court heard legal argument on the question of whether exhaustion could be required in a § 1983 action under the circumstances presented by these cases. At the conclusion of the hearing on the defendants' motion, the Court proceeded, on June 12, 1973, to hear the merits of McCray's claims. Testimony was presented over a three-day period.

On October 16, 1973, the Court issued an opinion and order denying defendants' motion to dismiss and denying McCray's claims for relief. In an order filed November 2, 1973, the Court amended its opinion and original order by granting the defendants' motion to dismiss and denying McCray's claims for relief. Judgments were entered accordingly on November 5, 1973. The opinion of the District Court is reported as McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973).

McCray appealed to the United States Court of Appeals for the Fourth Circuit which reached the merits of the cases and reversed the judgments of the District Court. McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975) (en banc). The Court of Appeals held that McCray's Eighth Amendment rights were violated by Burrell and Smith and remanded the cases for further proceedings to determine if McCray is entitled to damages and injunctive relief or if Burrell and Smith may avail themselves of a qualified immunity and good faith defense.

On April 25, 1974, the Court of Appeals had consolidated McCray's appeals with the appeal of Respondent James E.X. Stokes. See, infra. Briefs were filed in the McCray and Stokes cases, and they were argued on June 6, 1974. Subsequently, on June 27, 1974, without the Court having issued a decision, the McCray and

Stokes cases were consolidated with the case of Respondent Washington, see, infra, for en banc consideration by the Court of Appeals.

B. Boslow and Sorongon v. Washington

On October 16, 1973, John Washington, a Maryland state prisoner at the Patuxent Institution in Jessup, filed a pro se complaint in the United States District Court for the District of Maryland under 42 U.S.C. § 1983 claiming that he suffered injuries and deprivations of his constitutional rights as a result of the failure of Respondent Sorongon, a prison doctor, and Respondent Boslow, the Director of Patuxent Institution, to provide Washington with necessary medical care. Washington sought declaratory relief and an award of compensatory and punitive damages. He demanded a trial by jury.

The defendants below filed a motion to dismiss Washington's complaint on the sole ground that he had failed to exhaust state administrative remedies by presenting his claim to the Maryland Inmate Grievance Commission. The defendants relied exclusively on the previous decision by the Honorable Edward S. Northrop in McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973).

Counsel was appointed to represent Washington, and on April 4, 1974, a hearing was held before the District Court on the defendants' motion to dismiss. The parties submitted evidence concerning the adequacy of the Inmate Grievance Commission as a state administrative remedy for the purpose of exhaustion (including portions of the record from McCray v. Burrell, supra), and the Court heard argument by counsel.

On May 17, 1974, Chief Judge Northrop issued an opinion and order granting the defendants' motion to dismiss. The opinion was subsequently amended on May 22, 1974. Judgment was entered accordingly on May 20, 1974, and Washington made a timely appeal.

The opinion of the District Court is reported as Washington v. Boslow, 375 F. Supp. 1298 (D. Md. 1974).

Washington appealed to the United States Court of Appeals for the Fourth Circuit which reversed the judgment of the District Court and remanded the case for a determination on the merits.

C. McClellan v. Stokes

On December 4, 1973, James E.X. Stokes, a state prisoner at the Maryland Penitentiary in Baltimore, filed a pro se civil rights complaint in the United States District Court for the District of Maryland alleging that Petitioner McClellan and other prison officials violated his First and Fourteenth Amendment rights by denying him permission to receive and read two national political newspapers, the "Gay Liberator" and "Akwesasne Notes." On December 17, 1973, Stokes filed a supplemental pro se pleading.

The defendants below moved that Stokes' complaint be dismissed for failure to exhaust state administrative remedies on the authority of McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973). On April 1, 1974, the District Court granted the defendants' motion and ordered that Stokes' complaint be dismissed without prejudice to institute a further action after having unsuccessfully petitioned the Maryland Inmate Grievance Commission for relief. Judgment was entered accordingly on April 1, 1974.

Stokes appealed to the United States Court of Appeals for the Fourth Circuit which reversed the judgment of the District Court and remanded the case for a determination on the merits. McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975).

ARGUMENT

I. THE DECISIONS BELOW IN BOSLOW V. WASHINGTON AND McCLELLAN V. STOKES ARE CLEARLY CORRECT.

A. Boslow v. Washington

Petitioners Boslow and Sorongon are requesting this Court to decide whether a Maryland prisoner who alleges violations of

his constitutional rights arising out of the failure of prison officials to afford him necessary medical care may be required to exhaust state administrative remedies before being permitted to proceed in federal court under 42 U.S.C. § 1983. The Court should not grant certiorari, however, because the decision below was correct on grounds other than the issue being raised by the petitioners. Even assuming that the question presented is of sufficient importance to warrant review by this Court,[1] the case may be decided on narrower grounds, and the Court would not reach the important question.

The state administrative remedy of which Petitioners claim Washington must avail himself before being permitted to proceed under the Civil Rights Act in federal court is the Maryland Inmate Grievance Commission. Washington, however, sought only damages as relief, Washington v. Boslow, 375 F. Supp. 1298, 1299 (D. Md. 1974), and by Petitioners' own admission, Petition for a Writ of Certiorari, page 14, the Maryland Inmate Grievance Commission does not have the power to award either compensatory or punitive money damages. See also, McCray v. Burrell, 516 F.2d 357, 365 (4th Cir. 1975); Washington v. Boslow, supra at 1300.

A state administrative remedy is deemed to be inadequate, and hence not subject to the exhaustion requirement, when the agency is not empowered to grant effective relief. Gibson v. Berryhill, 411 U.S. 564 n.14 (1973). In addition, this Court has unequivocally held that "a damage action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies." Preiser v. Rodriguez, 411 U.S. 475, 494 (1973). See also, Ray v. Fritz, 468 F.2d 586, 587 (2nd Cir. 1972); Jones v. Decker, 436 F.2d 954 (5th Cir. 1970).

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1 See, the argument in part I(B), infra.

B. McClellan v. Stokes

In a series of opinions since Monroe v. Pape, 365 U.S. 167 (1961), the Supreme Court has established the rule that the exhaustion of state administrative remedies is unnecessary in a civil rights action. The remedy available under 42 U.S.C. § 1983 is supplementary to any state remedies. Federal jurisdiction may be invoked without the exhaustion of either available or effective state administrative remedies.

> We have previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy. We stated in Monroe v. Pape, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492:
>
> > "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." McNeese v. Board of Education, 373 U.S. 668, 671, 83 S.Ct. 1433, 1435 (1963).

In McNeese, the specific holding of the Court was that the purposes of 42 U.S.C. § 1983 would be defeated "if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court." 373 U.S. at 672, 83 S.Ct. at 1436. In Damico v. California, 389 U.S. 416, 88 S.Ct. 526 (1967) (per curiam), however, the Court interpreted McNeese to include the principle that

> "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy." (brackets in original). 389 U.S. at 417, 88 S.Ct. at 526.

See also, Carter v. Stanton, 405 U.S. 669, 92 S.Ct. 1232 (1972); Metcalf v. Swank, 406 U.S. 914, 92 S.Ct. 1778 (1972).

It may be argued that the holding in McNeese, standing by itself, did not fully resolve the question of whether there

are circumstances where the exhaustion of state administrative remedies may be required in a § 1983 proceeding since the Court appeared to qualify its holding by adding that

> [m]oreover, it is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights. 373 U.S. at 674-75, 92 S.Ct. at 1437.

In Damico, however, the three-judge District Court whose decision was reversed by the Supreme Court had found that the plaintiffs had "'failed to exhaust adequate administrative remedies.'" (emphasis added). 389 U.S. at 417, 88 S.Ct. at 52[illegible].[2]

The next occasion on which the Supreme Court considered the question of whether exhaustion of state remedies may be required in a § 1983 action was in a case brought by a Pennsylvania state prisoner who alleged that prison officials had violated his constitutional rights by confiscating his legal papers and materials. The Court reviewed the nature of the state administrative remedy and held that

> [i]n light of this it seems likely that to require petitioner to appeal to the Deputy Commissioner of Correction, the Commissioner, or to the Attorney General would be to demand a futile act. In any event, resort to these remedies is unnecessary in light of our decisions in Monroe v. Pape; McNeese v. Board of Education; and Damico v. California. (full citations omitted). Houghton v. Shafer, 392 U.S. 639, 640-41, 88 S.Ct. 2119, 2120 (1968) (per curiam).

As in McNeese, where the Court appeared to qualify its decision by finding that the state remedy was inadequate, the Court in Houghton, while holding that resort to state administrative remedies was unnecessary, also found that the exhaustion

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2 The dissenting opinion of Mr. Justice Harlan in Damico confirms that there was an adequate state administrative remedy available to the plaintiffs. The majority of the Court, however, held that exhaustion of that remedy was unnecessary.

of state remedies under the circumstances there would be an exercise in futility. In Wilwording v. Swenson, 404 U.S. 249, 92 S.Ct. 407 (1971) (per curiam), however, this Court foreclosed the possibility that its prior holdings could be interpreted to mean that the remedy provided by the Civil Rights Act is supplementary to a state administrative remedy only if the state remedy is not available and effective.

Wilwording v. Swenson was a case brought under § 1983 by state prisoners challenging prison conditions and disciplinary measures taken against them while confined in maximum security. The Court reaffirmed Monroe v. Pape, McNeese v. Board of Education and Damico v. California and cited them for the proposition that the remedy provided by the Civil Rights Act "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Furthermore, the Court held that

> [s]tate prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs. Houghton v. Shafer, 392 U.S. 639, 88 S.Ct. 2119, 20 L.Ed.2d 1319 (1968). There an inmate's challenge to the confiscation of his legal materials without first seeking administrative redress was sustained. Although the probable futility of such administrative appeals was noted, we held that in "any event, resort to these remedies is unnecessary." (citation omitted). 404 U.S. at 252, 92 S.Ct. at 409.

The most recent decisions of the Supreme Court specifically approve the holdings of the earlier cases that the exhaustion of state administrative remedies may not be required in an action brought under § 1983. Mr. Justice White delivered the opinion of the Court in Gibson v. Berryhill, 411 U.S. 564, 574-75, 93 S.Ct. 1689, 1695-96 (1973):

> .... this Court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C., § 1983. McNeese v. Board of Education, 373 U.S. 668 (1963); Damico v. California, 389 U.S. 416 (1967).

In Steffel v. Thompson, 415 U.S. 452, 472-73, 94 S.Ct. (1974)
1209, 1222/,Mr. Justice Brennan wrote for the Court:

> When federal claims are premised on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) -- as they are here -- we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights. See, e.g., McNeese v. Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961).

The decision in Steffel v. Thompson, supra, was explained by Mr. Justice Blackmun writing for the Court in Ellis v. Dyson, __U.S.__, 95 S.Ct. 1691, 1695 (1975):

> Exhaustion of state judicial or administrative remedies in Steffel was ruled not to be necessary, for we have long held that an action under § 1983 is free of that requirement. (citations omitted).

Petitioners suggest that the decision in Huffman v. Pursue, 420 U.S. 592, 95 S.Ct. 1200 (1975), which concerned an application of the principles of Younger v. Harris, 401 U.S. 37 (1971), indicates that there may be circumstances under which this Court would depart from the long-established principle that exhaustion of state administrative remedies may not be required in a § 1983 action; however, in footnote 21, Mr. Justice Rehnquist stated that "[b]y requiring exhaustion of state appellate remedies for the purposes of applying Younger, we in no way undermine Monroe v. Pape (citation omitted)."

Any doubt that the exhaustion of any state administrative or judicial remedies may/be not required before the federal courts exercise jurisdiction in a prisoner civil rights action was dispelled by this Court in Preiser v. Rodriguez, supra, where it was held that the sole federal remedy for a prisoner who challenges the fact or duration of his physical confinement and who requests his immediate or more speedy release is a writ of habeas corpus.

Significantly, and as Mr. Justice Brennan pointed out in his dissenting opinion,

> "the court does not graft the habeas corpus exhaustion requirement onto prisoner actions under the Ku Klux Klan Act, but it reaches what is functionally the same result by holding that the District Court's jurisdiction under the Act is in some instances displaced by the habeas corpus remedy. Henceforth, in such cases a prisoner brings an action in the nature of habeas corpus -- or he brings no federal court action at all." 411 U.S. at 503, 93 S.Ct. at 1843. See also, Id. at n.10.

Preiser v. Rodriguez is equally important for what it did not decide. The Court specifically rejected the State of New York's expansive claim that all prisoner complaints must be treated by the federal courts as habeas corpus petitions with the attendant exhaustion requirements. See, Brief for Respondents in Preiser v. Rodriguez, supra, page 9, n.2. The Court noted that there are circumstances where habeas corpus may be an alternative remedy to a proper action under § 1983, but it refused to hold that any action which may properly be brought under habeas corpus must be brought under habeas corpus. Instead, the Court reaffirmed its view that

> a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life but not to the fact or length of his custody. 411 U.S. at 499, 93 S.Ct. at 1841.

See also, Humphrey v. Cady, 405 U.S. 504, 516-17 n.18 (1972).

The substantial and uniform series of decisions by this Court since Monroe v. Pape establish the rule that in an action brought under the Civil Rights Act of 1871 (42 U.S.C. § 1983), the plaintiff may not be required to exhaust state remedies before being permitted to proceed in federal court. The plaintiff need not exhaust a state administrative remedy even where the remedy is available and adequate. "State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." Wilwording v. Swenson, 404 U.S. at 252, 92 S.Ct. at 409.

This Court has often recognized the unique role of the Civil Rights Acts. See, Zwickler v. Koota, 389 U.S. 241, 245-249 (1967); England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 415 (1964); Monroe v. Pape, 365 U.S. 167, 180 (1961); Mitchum v. Foster, 407 U.S. 225, 242 (1972); District of Columbia v. Carter, 409 U.S. 418 (1973). Generally, Chevigny, Section 1983 Jurisdiction: A Reply, 83 Harv. L. Rev. 1352, 1356-58 (1970). There are strong policy considerations which underlie this Court's determination that exhaustion of state remedies is not a prerequisite to proceeding in federal court in actions properly brought under 42 U.S.C. § 1983:

> "We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." [Stapleton v. Mitchell, 60 F. Supp. 51, 55 (D. Kan. 1945)]. McNeese v. Board of Education, 373 U.S. at 674 n.6, 83 S.Ct. at 1437.

The decision below, a unanimous decision by the Court of Appeals en banc, is based upon settled law and is clearly correct. See also, Jones v. Metzger, 456 F.2d 854, 856 (6th Cir. 1972); Beale v. Blount, 461 F.2d 1133, 1139 n.11 (5th Cir. 1972); Shelton v. Union County Board of Commissioners, 483 F.2d 1406, 2 Prison L. Rptr 578 (7th Cir. 1973) (unpublished per curiam opinion); Brooks v. Center Township, 485 F.2d 383, 386 (7th Cir. 1973); McClelland v. Sigler, 456 F.2d 1266, 1267 (8th Cir. 1972); Raper v. Lucey, 488 F.2d 748, 751 n.3 (1st Cir. 1973); Conover v. Montemuro, 477 F.2d 1073, 1079 (3rd Cir. 1973); Padilla v. Ackerman, 460 F.2d 477, 479 (9th Cir. 1972); LeVier v. Woodson, 443 F.2d 360, 361 (10th Cir. 1971); Blair v. Rockefeller, 469 F.2d 641, 642 (2nd Cir. 1972).

In support of their argument that the Court should grant certiorari in this case, Petitioners claim that the decision below "undermines the various reform measures that the states have undertaken to date," Petition for Writ of Certiorari, page 22, and that it "would effectively stifle hopes of future programs to ameliorate prisoner grievances through state mechanisms." Id. These claims are wholly unsupportable and do not render the issue presented of sufficient importance to warrant this Court's review. The Court has recently denied certiorari in a case which appears to have raised the same issue. Twomey v. Wright, __U.S.__, 43 L.W. 3525, 3528, 3530 (3/24/75).

The recent proliferation of prisoner grievance mechanisms in the various state prison systems has occurred despite the settled law which precludes an exhaustion requirement for prisoners in cases properly brought under § 1983. See, "Prison Grievance Procedures: A National Survey of Programs Underway," Corrections Magazine, January/February, 1975. Grievance procedures, such as the Maryland Inmate Grievance Commission, have developed because state prison officials perceive the need for such mechanisms in the proper administration of their prison systems. Petitioners offer no empirical support for their claim that the decision below will in any way adversely affect the progress which is being made in this area.

In fact, it would appear that the no-exhaustion rule in § 1983 cases has a beneficial effect on the development of grievance procedures. The availability of federal court relief for prisoners is an incentive for the states to provide grievance procedures which act promptly and fairly. If a state grievance mechanism is visible and has simple, workable procedures, and if prisoners believe that they will have a fair opportunity to present their claims to an agency which will provide relief

where appropriate in a reasonable period of time, many potential pro se litigants in federal court would avail themselves voluntarily of such a procedure rather than engage in difficult and protracted litigation.

If prison systems become capable of internally resolving many prisoner grievances, there will be less litigation in the federal courts. Grievance procedures, such as the Maryland Inmate Grievance Commission, therefore, will serve to reduce the number of prisoner civil rights complaints without this Court taking the drastic and unprecedented action of holding that a civil rights action may be dismissed for failure to exhaust state remedies.[3]

In one of the earliest prisoner civil rights cases to come before the federal courts, the government made the argument that to permit a prisoner to be heard on his claims in the District Court would be to "encourage a flood of such petitions." Sewell v. Pegelow, 291 F.2d 196, 198 (4th Cir. 1961). The Court of Appeals rejected that argument, and the rationale for its decision is applicable in the present case:

> "We must not play fast and loose with basic constitutional rights in the interest of administrative efficiency." (citation omitted). Id.

See also, Johnson v. Glick, 481 F.2d 1028, 1030 (2nd Cir. 1973). A similar concern about a potential plethora of groundless claims was rejected by the Supreme Court in Monroe v. Pape, supra. See, dissenting opinion at 240 n.68.

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3 An effect of Preiser v. Rodriguez, supra, will be to substantially reduce the number of constitutional claims by prisoners which may be litigated under 42 U.S.C. § 1983. See, Schneckloth v. Bustamonte, 412 U.S. 218, 260 n.14, 93 S.Ct. 2041, 2065 (1973) (concurring opinion).

Although the federal courts must maintain a respect for state institutions, the concept of federalism may not be permitted to shield an invasion by state officials of a citizen's constitutional rights. Jordan v. Hutcheson, 323 F.2d 597, 601 (4th Cir. 1963). The Supreme Court has held that federal courts have a duty to enforce the constitutional rights of all persons including prisoners. Cruz v. Beto, 405 U.S. 319, 321, 92 S.Ct. 1079, 1081 (1972) (per curiam).

> Prison officials are encouraged to continue to make progress towards improvement of prison conditions. State courts, it is to be hoped, will join in such encouragement, but if a case comes to this court demonstrating constitutional violations it is the duty of this court to face the issue rather than pass the issue back to a state court or a state prison administrator. (citation omitted). Exhaustion of the plaintiff and of state remedies is not required under 42 U.S.C. § 1983. Castor v. Mitchell, 355 F. Supp. 123, 125-26 (W.D. N.C. 1973).

See also, Kersh v. Bounds, 364 F. Supp. 590, 592 (W.D. N.C. 1972); Delorme v. Pierce Freightlines, Co., 353 F. Supp. 258, 260 (D. Ore. 1973).

The Supreme Court has recognized its own limitations in establishing the powers and duties of the federal judiciary and has consistently held that decisions concerning matters of fundamental policy are for Congress, not the Court, to make. See, e.g., Flood v. Kuhn, 407 U.S. 258, 92 S.Ct. 2099 (1972). Congress has responded with new laws when it deemed such legislation was necessary. For example, in light of Fay v. Noia, 372 U.S. 391 (1963), Congress rewrote 28 U.S.C. §§ 2254 and 2255 to provide guidance to the federal courts in habeas corpus proceedings. Similarly, Congress has legislated exhaustion of remedies requirements in other areas; e.g., the collection of state taxes (28 U.S.C. § 1341) and state utility rate orders (28 U.S.C. § 1342). See

also, Love v. Pullman Company, 404 U.S. 522, 92 S.Ct. 616 (1972). On the other hand, Congress has not enacted an exhaustion requirement for 42 U.S.C. § 1983. Its inaction is consistent with this Court's holding in Monroe v. Pape that Congress did not intend there to be an exhaustion requirement in such cases.

II. THE DECISIONS BELOW IN BURRELL V. McCRAY AND SMITH V. McCRAY ARE CLEARLY CORRECT AND PRESENT ISSUES WHICH DEPEND UPON THE FACTS OF THESE CASES AND ARE OF IMPORTANCE ONLY TO THE IMMEDIATE PARTIES.

The Court of Appeals reached the merits in Burrell v. McCray and Smith v. McCray and held that Petitioners violated McCray's Eighth Amendment right to be free from cruel and unusual punishment when they subjected him to isolated confinement in "strip cells" for periods of two days. The important facts were stated by the Court of Appeals as follows (see also, 367 F. Supp. at 1210 et seq.):

A. No. 74-1043-McCray v. Smith

> On or about November 20, 1971, McCray was moved from his regular cell because of his complaints about unsanitary conditions. Sergeant Smith, who had never met McCray before, ordered his removal, had him showered and deloused and placed him in another cell on a different tier. The warden instructed Smith to provide McCray with his law books and legal materials which were kept in his regular cell. When they were not provided to him at once, McCray began a substantial vocal disturbance. Additionally, the screaming McCray tore a locker off the cell wall and banged it repeatedly against the wall.
>
> Sergeant Smith determined that McCray should be removed from this cell and placed in the isolated confinement (I.C.) area, cell No. 5. As found by the district court, "this measure was taken to avoid the possibility of causing a greater disturbance among the other inmates." 367 F.Supp. at 1211. While McCray was being removed, again, as found by the district court, he "began shouting insults and threatening to do bodily harm to himself." Id. Smith, treating these threats as an indication of mental and emotional instability, directed that McCray be placed in isolated confinement without any clothes or bedding. This was done to protect McCray from harming himself.
>
> McCray was placed nude in the cell about 11:30 a.m., November 20. The cell, itself, was quite long and narrow with a high ceiling. The walls, ceiling and floor were all concrete and there was a one-foot high concrete slab,

six to eight feet long and three feet wide, which was McCray's bed. Although, initially, McCray was furnished no blankets or other bedding, during the night a prison guard gave him a mattress. McCray testified that it was so cold that he tore open the mattress, which was old and deteriorated, and dug a channel down in the cotton so that he could sleep nestled in the mattress. Subsequently, McCray was disciplined for destroying the mattress.

The cell contained a toilet and a sink. The record does not show whether the cell had a window, but evidence was offered that there was a light bulb recessed in the rear wall. The cell had two doors-the inner one composed of bars, and the outer one made of solid wood but not closed. McCray was given no materials with which to clean himself or the cell, and he was fed in plastic cups. He was deprived of reading and writing materials.

The next morning Sergeant Smith returned to check on McCray and found that he had defecated into a cup and smeared feces over himself and the cell wall. Accordingly Smith decided not to return him to his former cell. Instead, he had McCray bathed and the cell scrubbed, and then returned McCray to I.C. cell No. 5 for another twenty-four hours. It was not until that time that Smith caused notice to be given to a psychologist or psychiatrist in accordance with the applicable written administrative directive which had become effective August 10, 1970. The directive stated that "an inmate who is displaying mentally disturbed behavior may be placed in an isolation cell for the inmate's own safety, or that of the inmate population, until the psychologist/psychiatrist is notified . . ." and directed that the "psychologist/psychiatrist should be contacted immediately after the confinement of the inmate, and the inmate should be evaluated within a twenty-four (24) hour period." (Emphasis added.) By its terms, the directive permitted the placing of inmates displaying mentally disturbed behavior in a punitive or isolation cell when the institution lacks a mental observation cell and a psychologist or a psychiatrist approves the lodging of such an inmate in an isolation cell.

The next day, November 22, McCray, according to Smith, "started acting alright." He was then returned to his regular cell

on the third tier. We infer that McCray's clothes were not returned to him until this time. The record on appeal does not show that he was ever evaluated by a psychologist or a psychiatrist.[2]

2. Sergeant Smith implied that the psychologist, one Dr. Musk, did see McCray. Dr. Musk testified that he could not report whether he had talked to McCray at this time. He said he would "most probably" have recorded such a visit, but often did not.

B. No. 74-1042-McCray v. Burrell

On or about January 1, 1972, McCray was again removed to another cell. A fire broke out in McCray's cell, according to McCray, accidentally, but in the belief of Captain Burrell, by design. In either event, McCray was burned. Not without difficulty, the guards extinguished the fire and conveyed McCray to the dispensary where, despite McCray's resistance, the nurse on duty treated his burns. The nurse suggested that McCray remain in a locked cell in the hospital. At a later date, McCray was disciplined for setting fire to his cell.

Captain Burrell, who was present when McCray was treated, not unreasonably believed that McCray had set the fire. Since he concluded that McCray was mentally unstable, he decided, despite the nurse's suggestion, to place McCray in a mental observation (M.O.) cell, again without clothes or a mattress or other bedding. McCray was placed in the M.O. cell at about 9:45 a.m., January 1, and released about 8:00 a.m., January 3. At about the time he was treated in the dispensary, the nurse, purportedly acting in accordance with the written directive to which reference has been made, contacted a physician and informed him that McCray was placed in M.O. The physician told her to communicate with another doctor, whom she was unable to reach, and McCray was not seen by a physician until January 4, 1972.

The M.O. cell in which McCray was placed was described by Captain Burrell as a bare cell. The windows were covered with sheet metal; but the cell had an electric light. The cell had concrete walls, a concrete ceiling, and a tile floor. There was no sink, and the only sanitary facility was

> an "oriental toilet"-a hole in the floor, six to eight inches across, covered by a removable metal grate which was encrusted with the excrement of previous occupants. The "toilet" flushed automatically once every three to five minutes. McCray was not permitted to bathe, shave or have or use articles of personal hygiene, including toilet paper. He was not afforded reading or writing materials. He claimed that during the forty-six hours he spent in this confinement "it was impossible to sleep . . . I stood up most of that [first] night, the floor was cold." 516 F.2d at 365-67.

In McCray's suit against Smith, the Court of Appeals stated that "[t]he conditions of confinement in I.C. cell No. 5 came perilously close to a denial of eighth amendment rights in and of themselves, but the record is not sufficiently complete that we rest our decision on this ground." Id. at 368. The holding of the Court was that although a prisoner, who exhibits a mental condition which suggests that he may harm himself or others, may be removed from the general population and subjected to protective measures, the confinement of McCray, naked, in isolation, for two days, without any immediate effort by Smith to obtain a prompt medical evaluation and necessary treatment for McCray, violated his Eighth Amendment rights. Id. at 368-69. While recognizing that the isolation of a prisoner for his own protection and the safety of the prison may be a rational means to reach a permissable end, the confinement of McCray,under the conditions and for the length of time in this case, without securing medical attention for him, was arbitrary, unreasonable and unnecessary. See, Id. at 368 n.3.

In McCray's action against Burrell, the Court of Appeals found two violations of the Eighth Amendment: "First, the record reveals that the conditions of confinement in the mental observation (M.O.) cells in which McCray was kept fall far short of the current standards of decency of present-day society." Id. at 369. Second, even assuming that the conditions of isolated

confinement did not constitute a per se violation of the Eighth Amendment, the deprivations, discomforts and suffering resulting from such confinement should have been alleviated, and less barbarous means of protection should have been provided by Burrell. Id. The failure of Burrell, upon learning that expert medical help was not forthcoming for McCray within a reasonable period of time, to devise and employ means to protect McCray from injuring himself other than by continued isolation while being deprived of clothing and elements of personal hygiene, violated McCray's right to be free from cruel and unusual punishment.

The Court of Appeals' decisions in McCray's actions against Smith and Burrell were clearly correct. Petitioners claim that the Court erred by refusing to accept the District Court's findings of fact. The Court of Appeals, however, specifically stated that, "[t]he district court made extensive findings of fact, resolving questions of credibility, and we accept those findings. We disagree, however, with the legal conclusions to be drawn therefrom." Id. at 365. See also, Id. at 367.

Petitioners also claim that the decision of the Fourth Circuit rests on a finding that "it did not like isolated confinement rather than on a finding that the Eighth Amendment prohibits such isolated confinement." Petition for a Writ of Certiorari, page 24. The Court's decision, however, is supported by numerous other lower federal court decisions which have held that isolated confinement under certain circumstances is unconstitutional. See, McCray v. Burrell, supra at n.3 and n.4. See also, McCray v. Sullivan, 509 F.2d 1332, 1336 (5th Cir. 1975) ("...the common element in cases finding a violation of the Eighth Amendment is the deprivation of the basic elements of hygiene."); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Jordan v. Fitzharris,

257 F. Supp. 674 (N.D. Cal. 1966); Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), modified, 456 F.2d 835 (5th Cir. 1972); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969). See also, Wheeler v. Glass, 473 F.2d 983 (7th Cir. 1973).

This Court should not review issues which are of interest and importance only to the immediate parties and which affect few persons other than the litigants. The decisions below in the McCray cases present such issues. The decisions turn upon their own unique facts, and it is unlikely that the issues will recur.

On January 23, 1974, Maryland state officials ordered that use of the mental observation unit (the "blue room"), in which McCray was confined by Burrell, be discontinued. The Morning Sun and The Evening Sun, Baltimore, January 24, 1974. The unit has not been reopened. Furthermore, Maryland Division of Correction Commissioner James Jordan was quoted as stating that prisoners "will not be stripped or housed in bare cells." Id. Robert J. Lally, secretary of the Maryland Department of Public Safety and Correctional Services, said that under no circumstances "will inmates be returned to the blue room." Id.

Maryland prison officials have also taken action to assure that Penitentiary prisoners will not be subjected to the mistreatment which McCray suffered as a result of being confined by Smith in the isolated confinement cells. In addition to the "administrative directive" which was referred to by the Court of Appeals in its opinion,and which has been reissued as Maryland Division of Correction Regulation No. 110-4, the Division also now requires that a record will be maintained on Division of Correction Form 110-1R of all inmates placed in isolation cells. The form provides a log of the dates and times when psychologists, psychiatrists or other professional staff members visit prisoners in isolation.

The Court of Appeals was clearly correct in determining that McCray's Eighth Amendment rights were violated when he was confined in the mental observation cell by Burrell and in the isolated confinement cell by Smith under the circumstances of these cases. The Court properly remanded the cases to the District Court to provide Smith and Burrell with the opportunity to prove a qualified immunity and good faith defense.

The Supreme Court has granted certiorari in several recent cases to review prison practices and regulations. See, Procunier v. Martinez, 416 U.S. 39[illegible] (1974); Wolff v. McDonnell, 418 U.S. 539 (1974); Preiser v. Newkirk, __U.S.__, 95 S.Ct. 2313 (1975); Montanye v. Haymes, 508 F.2d 837 (2nd Cir. 1975), cert. granted, 43 L.W. 3681 (6/30/75). All of these cases concerned unresolved questions of fundamental importance in the overall administration of state prison systems throughout the country . By comparison, the McCray cases arose as the result of the conduct of individual guards in a unique factual situation. The cases do not present issues which are of sufficient importance to warrant review by this Court.

CONCLUSION

For the foregoing reasons, this cause should not be reviewed by this Court, and the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-44

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONERS

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OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit in *McCray v. Burrell,* 516 F.2d 357 (4th Cir. 1975) appears in the Appendix to the Petition for Writ of Certiorari at pp.

72a-107a. The Opinion and Judgment of the United States District Court for the District of Maryland in *McCray v. Burrell* and *McCray v. Smith*, 367 F. Supp. 1191 (D. Md. 1973) appears in the Appendix to the Petition for Writ of Certiorari at pp. 1a-58a. The Opinion and Judgment of the United States District Court for the District of Maryland in *Washington v. Boslow*, 375 F. Supp. 1298 (D. Md. 1974), appears in the Appendix to the Petition for Writ of Certiorari at pp. 58a-69a. The unreported Opinion of the United States District Court for the District of Maryland in *Stokes v. McClellan*, Civil No. 73-1182-B, (D. Md. Memorandum and Order, April 1, 1974) appears in the Appendix to the Petition for Writ of Certiorari at pp. 69a-71a.

JURISDICTION

This Court has jurisdiction to review this cause by Certiorari pursuant to 28 U.S.C. § 1254 (1), and has accepted it for such purpose by granting said Writ on November 3, 1975.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979.

Article 41, Annotated Code Of Maryland

(Ch. 210, Laws of Maryland, 1971)

§ 204F. Inmate Grievance Commission.

(a) *Commission established; appointment and terms of members; chairman; vacancies; compensation and expenses.* — The Inmate Grievance Commission is established as a separate agency within the Department of Public Safety and Correctional Services. It shall consist of five members appointed by the Governor with the advice of the Secretary of Public Safety and Correctional Services. Of the five members so appointed, not less than two shall be lawyers qualified to practice law in the State of Maryland and not less than two members shall be persons of knowledge and experience in one or more of the fields under the jurisdiction of the Department of Public Safety and Correctional Services. Of the members initially appointed, twc shall be for a term of four years, one shall be for a term of three years, one shall be for a term of two years and one shall be for a term of one year. Thereafter, all reappointments shall be for terms of four years. The Governor, with the advice of the Secretary of Public Safety and Correctional Services shall designate the chairman from time to time. The Governor, with the advice of the Secretary of Public Safety and Correctional Services, shall fill any vacancy which occurs before the expiration of a term for the balance of the term so remaining. Each member of the Commission shall receive per diem compensation as provided in the budget for each day actually engaged in the discharge of his official duties as well as reimbursement for all necessary and proper expenses, in accordance with the standard travel regulations.

(b) *Appointment and salary of executive director; investigative, secretarial and clerical employees.* — The Secretary of Public Safety and Correctional Services, with the advice of the Commission, and with the approval of the Governor, shall appoint an executive director of the Commission who shall serve at the pleasure of the Secretary and who shall receive such salary as provided in the budget. In addition, the Secretary may provide the Commission with such investigative, secretarial and clerical employees as may be necessary for the efficient administration of the powers and duties of the Commission and as provided in the budget.

(c) *Removal of members.* — The Governor, upon the recommendation of the majority of the Commission or upon the recommendation of the Secretary, may remove any member of the Commission for one or more of the following:

(1) Conviction of a crime involving moral turpitude or of any criminal offense the effect of which is to prevent or interfere with the performance of Commission duties.

(2) Failure to regularly attend meetings of the Commission.

(3) Failure to carry out duties assigned by the Commission or its chairman.

(4) Acceptance of another office or the conduct of other business conflicting with or tending to conflict with the performance of Commission duties.

(5) Any other ground which, under law, necessitates or justifies the removal of a State employee.

(d) *Submission of grievance or complaint.* — Any person confined to an institution within the Division of Correction, or otherwise in the custody of the Commissioner of Correction, or confined to the Patuxent Institution, who has any grievance or complaint against any officials or employees of the Division of Correction or the Patuxent Institution, may submit such grievance or complaint to the Inmate Grievance Commission within such time and in such manner as prescribed by regulations promulgated by the Commission. If, and to the extent that, the Division of Correction or the Patuxent Institution has a grievance or complaint procedure applicable to an inmate's particular grievance or complaint, and if the Inmate Grievance Commission deems such procedure reasonable and fair, the Commission may by regulations require that such procedure be exhausted prior to the submission of the grievance or complaint to the Commission.

(e) *Preliminary review.* — When a grievance or complaint is submitted to the Inmate Grievance Committee, the Commission, or any member thereof or the executive director, if so provided by the Commission's regulations, shall preliminarily review the grievance or complaint. If upon such preliminary review the grievance or complaint is determined to be on its face wholly lacking in merit, it may be dismissed, by the reviewing commissioners or commissioner or executive director as the case may be, without a hearing or without specific findings of fact. Such order of dismissal shall be forwarded to the complainant within 60 days after submission of the grievance or complaint and shall constitute the final decision of the Secretary of Public Safety and Correctional Services for purposes of any judicial review.

(f) *Hearing and disposition by Commission; review by Secretary of Public Safety and Correctional Services.* — Whenever, after the preliminary review provided for in subsection (e), a grievance or complaint is not found to be on its face wholly lacking in merit, the Commission shall as promptly as practicable hold a hearing on the grievance or complaint. At least three members of the Commission shall sit at any hearing, and decisions shall be by a majority of those sitting. A record of the testimony presented at the hearing shall be kept according to the rules and regulations promulgated by the Commission. The Commission's decision shall be issued promptly after the hearing in the form of an order which shall include a statement of the findings of fact, the Commission's conclusions and its disposition of the complaint. The types of disposition shall be as follows:

(1) If after the hearing, the Commission finds in its order that the complaint is wholly lacking in merit and should be dismissed, such an order of dismissal shall be promptly forwarded to the complainant and shall constitute the final decision of the Secretary of Public Safety and Correctional Services for purposes of any judicial review.

(2) However, if after the hearing, the Commission in its order finds that the inmate's complaint was in whole or in part meritorious, such order shall be promptly forwarded to the Secretary of Public Safety and Correctional Services. Within fifteen days of the receipt of such an order, the Secretary by order shall affirm the order of the Commission, or shall reverse or modify the order where he disagrees with the findings and conclusions of the Commission. The Secretary shall order that the appropriate official of the institution in question accept in whole or in part the recommendation

of the Commission or the Secretary may take whatever action he deems appropriate in light of the Commission's findings. The order of the Secretary shall be promptly forwarded to the complainant, and the Secretary's order shall constitute the final decision for purposes of judicial review.

(g) *Access to documentary evidence; subpoenas; oaths and affirmations.* — The Commission, with the approval of the Secretary of Public Safety and Correctional Services, shall at all reasonable times have access to, for the purposes of examination, and the right to copy, any documentary evidence of any person or institution being investigated or proceeded against and may require by subpoena the attendance and testimony of witnesses and the production of all documentary evidence of any person relating to any matter under investigation. The presiding commissioner at a hearing may administer oaths and affirmations.

(h) *Right of inmate to appear before Commission; opportunity to call witnesses; representation by counsel.* — The inmate shall have the right to appear before the Commission and shall have the opportunity to call a witness or a reasonable number of witnesses depending upon the circumstances and the nature of the complaint, subject to the discretion of the Commission as to the relevancy of the testimony and questions and the number of witnesses sought to be called. The inmate shall have a reasonable opportunity to question any witnesses who testify before the Commission. Such rights of the inmate shall not be unreasonably withheld or restricted by the Commission. If the inmate requests that he be represented at the hearing by an attorney of his own choosing he shall be permitted such representation at his own expense.

(i) *Record of complaints.* — A record shall be kept of all complaints and their disposition which shall be open to public inspection during regular business hours.

(j) *Conduct of hearings at certain institutions.* — For the performance of its duties, the Commission may conduct hearings at the institutions under the supervision and control of the Division of Correction or at the Patuxent Institution.

(k) *Rules and regulations.* — The Commission, subject to the approval of the Secretary, shall have the power to adopt rules and regulations for the conduct of its proceeding as provided for in this section.

(l) *Judicial review.* — No court shall be required to entertain an inmate's grievance or complaint within the jurisdiction of the Inmate Grievance Commission unless and until the complainant has exhausted the remedies as provided in this section. Upon the final decision of the Secretary of Public Safety and Correctional Services, the complainant shall be entitled to judicial review thereof. Proceedings for review shall be instituted in the circuit court of the county or in the Baltimore City Court, as the case may be, in which is located the institution where the complainant is confined. Review by the court shall be limited to a review of the record of the proceedings before the Commission and the Secretary's order, if any, pursuant to such proceedings. The court's review shall be limited to a determination of whether there was a violation of any right of the inmate protected by federal or State laws or constitutional requirements.

QUESTIONS PRESENTED FOR REVIEW

I. Is exhaustion of adequate and effective state administrative remedies required in an action brought by a state prisoner pursuant to 42 U.S.C. § 1983?

II. Do the exceptions recognized by federal courts to the principle that exhaustion of state administrative remedies is not required in an action pursuant to § 1983 indicate that a similar exception should apply in this case?

III. Do sound and overriding policy reasons require exhaustion of Maryland's effective and adequate state administrative remedies pursuant to § 1983?

STATEMENT OF THE CASE

The complaints in these cases invoked the jurisdiction of the United States District Court for the District of Maryland pursuant to 28 U.S.C. § 1343(3) and (4), 42 U.S.C. § 1983 and the Constitution of the United States.

Respondent McCray sought relief pursuant to 42 U.S.C. § 1983 for alleged deprivations of liberty without due process of law and for alleged imposition of cruel and unusual punishment arising out of two separate incidents in which he was allegedly placed naked in an isolation cell for 48 hours as a result of disruptive and emotionally unstable behavior on his part. The United States District Court for the District of Maryland in *McCray v. Burrell,* 367 F. Supp. 1191 (D. Md. 1973), found no constitutional violations on the part of Petitioners Burrell and Smith and further found that they had acted in accordance with standard operating procedures which were not violative of Respondent's civil rights. The United States District Court further found that Respondent was required to exhaust his

State administrative remedies provided in Article 41, Section 204F, Annotated Code of Maryland.

Respondent Stokes filed a pro se complaint pursuant to 42 U.S.C. § 1983 alleging that prison officials had violated his First and Fourteenth Amendment rights by denying him access to political newspapers. The United States District Court, on the Motion of Petitioner McClellan herein, dismissed the case for failure to exhaust State administrative remedies as outlined above.

Respondent Washington filed a pro se complaint pursuant to 42 U.S.C. § 1983 alleging injuries and violations of his constitutional rights as a result of the failure of a prison doctor to provide him with necessary medical care. The United States District Court summarily dismissed the complaint for failure to exhaust State administrative remedies which the District Court found would have provided fair and adequate redress for the Respondent.

McCray v. Burrell, McCray v. Smith and *Stokes v. McClellan* were consolidated for purposes of appeal and the same were heard before a three-judge panel of the United States Court of Appeals for the Fourth Circuit on June 6, 1974. Following argument, the United States Court of Appeals for the Fourth Circuit, by Order dated June 27, 1974, consolidated *Washington v. Boslow* with the above three cases and the same were heard *en banc* before the United States Court of Appeals for the Fourth Circuit on October 1, 1974.

On April 10, 1975, the United States Court of Appeals for the Fourth Circuit held that exhaustion of State administrative remedies was not required prior to invoking Federal jurisdiction, reversed all of the judgments below and remanded the cases of Respondents Stokes and Washington for a determination on the merits. The cases of Respondent McCray were remanded for further proceedings in accordance with their finding that Respondent McCray was denied his rights under the Eighth and Fourteenth Amendments to the United States Constitution.

Judge Field filed a separate opinion in which he concurred and dissented and in which Judge Russell joined. Judge Widener also filed a separate opinion in which he concurred and dissented and in which Judge Russell joined.

A Petition for the issuance of the Writ of Certiorari was timely filed and by Order of November 3, 1975, this Court granted the Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit in these cases.

Facts

The following statement of facts in *McCray v. Burrell* and *McCray v. Smith* is presented in a case-by-case manner. Every effort has been made to distinguish between facts found by the District Court and facts recited by the District Court which appear from the testimony.

A. McCray v. Burrell

Respondent McCray, a prisoner at the Maryland Penitentiary in Baltimore, Maryland, was placed in cell number 325 of the South Wing on December 31, 1971 by Officer Fozzio between 6:00 P.M. and 7:00 P.M. Apparently, the cell had not been cleaned since the departure of the last occupant as there was paper, blankets, a metal locker and other trash lying on the floor. Respondent McCray requested that the cell be

cleaned up, but was informed that it was too late in the evening. Respondent McCray then swept the trash in front of his cell door ostensibly to be pushed out into the tier the following day. *McCray v. Burrell* 367 F. Supp. 1191, 1212 (D. Md. 1975) (App. 39a).[1]

At approximately 9:00 A.M. on January 1, 1972, Respondent, who testified that he does not usually smoke, borrowed a cigarette and a light from the inmate in the adjacent cell. He testified further to dozing off with the lit cigarette in his hand and awakening to find the cell was filled with smoke. *McCray, supra,* at p. 1212 (App. 39a). He stated that he attempted to stamp out the fire, then to smother the blaze with the mattress. *McCray, supra,* at p. 1212 (App. 40a). He took a bucket and tried to carry water from the sink to douse the fire, but the bucket would not properly fit under the sink, so he used a metal cabinet to first break the sink and then the toilet, to allow the water to flow more freely. When these attempts failed, he covered his head and body with water. He stated that he did not set the fire intentionally, but was charged with that offense in an institutional disciplinary proceeding. *McCray, supra,* at p. 1212 (App. 40a).

The correctional officers, in the meantime, attempted to put out the fire with a malfunctioning fire extinguisher. After a short period of time, they procured a second extinguisher and managed to put out the fire.

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[1] The designations marked "App." ___ are to the Appendix contained in Petitioners' Petition for Writ of Certiorari previously filed in this case. The designation "A." refers to the Appendix filed with this Brief.

McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973), will be referred to hereinafter as *McCray, supra,* at p. ___ *McCray v. Burrell,* 516 F.2d 357 (4th Cir. 1975), will be referred to hereinafter as *McCray, supra,* 516 F.2d at p. ___

Respondent testified that he suffered burns to his hands and face, but the testimony of the nurse on duty at the time of the fire, Mrs. Weber, and the dispensary records, revealed that there were no blisters or serious burns evident. *McCray, supra,* at pp. 1212-1213 (App. 40a). Mrs. Weber, stated that when Respondent was brought into the infirmary, he was arrogant and literally refused to allow Officer Martin to apply cold compresses to the areas that he complained had been burned. *McCray, supra,* at p. 1213 (App. 40a). The Officer, however, was finally able to apply the compresses and bacitracin ointment to his burns. Mrs. Weber, according to the testimony of Respondent, then recommended that he be placed in a locked cell. *McCray, supra,* at p. 1213 (App. 40a). Captain Burrell, a correctional officer and duty captain whose responsibility was the operation and administration of the Penitentiary on the 8:00 A.M. to 4:00 P.M. shift, ordered that Respondent be placed in the Mental Observation area (M.O.). Captain Burrell testified that he issued this order acting upon information that Respondent had intentionally set the fire, and, as this was not a rational act, he believed Respondent McCray to be mentally unstable. *McCray, supra,* at p. 1213 (App. 40a). The District Court found that Captain Burrell made a reasonable determination under the circumstances. Having done this, Captain Burrell, for Respondent's own safety, as well as the safety of the other inmates, decided to place Respondent McCray in M.O. without clothes or a mattress. He testified that this was normal procedure whenever he had reason to believe that an inmate might try to injure himself. *McCray, supra,* at p. 1213 (App. 41a).

Respondent remained in the M.O. area for approximately 48 hours, from January 1-3, 1972. While the

District Court found that apparently Respondent McCray was not visited by a medical doctor, nurse, or a psychologist during this interval, the District Court also found that shortly after Respondent was treated in the dispensary, Nurse Weber contacted Dr. Holljes, advising him that the patient had been placed in M.O., and attempted unsuccessfully to contact a Dr. Stewart. The records introduced indicated that Respondent was next seen by a physician, Dr. Wood, on January 4, 1972. *McCray, supra,* at p. 1213 (App. 41a).

On January 13, Respondent was examined by Dr. Gould who testified that he noticed several crusted sores on Respondent's cheeks, ears, a small amount on his back (which the Respondent did not remember until questioned on cross examination), and some sores on his knuckles. *McCray, supra,* at p. 1213 (App. 41a). Dr. Gould further testified that the application of cold compresses and an antibiotic ointment, similar to the type applied to Respondent by Officer Martin, was the appropriate treatment. While he stated that this treatment should have been continued for a period of time, he could not say that it was inadequate. *McCray, supra,* at p. 1213 (App. 41a).

Although there was no testimony given to explain why a psychologist did not examine Respondent during his confinement in the M.O. area, the District Court found that the New Year's holiday weekend was a contributing factor. Captain Burrell indicated during his testimony that the Penitentiary was shorthanded at this time, a factor he considered when he decided to place Respondent in the M.O. area. *McCray, supra,* at p. 1213 (App. 41a).

After Respondent's release from M.O. on the morning of January 3, 1972, he was returned to the South Wing

of the Penitentiary. He was seen by Dr. Wood on January 4, and by Dr. Holljes on January 6. Respondent was charged by the Penitentiary with setting his cell on fire and destroying prison property. At a disciplinary hearing on January 6, 1972 he was found guilty and sentenced to serve six (6) months on South Wing and to pay restitution for the damages. His appeal to the Warden was denied.

B. McCray v. Smith

Respondent testified that on November 20, 1971 he was placed in a cell on the "street side" of the South Wing, but asked to be moved to another cell because that one was in an unsanitary condition. *McCray, supra,* at p. 1211 (App. 37a). Sergeant Smith, who had never met Respondent took Respondent to the lowest tier on the South Wing, where he was showered. Respondent was then placed in a cell on the fourth tier, "yard-side," of the South Wing, where he began "hollering and yelling," demanding his legal materials and his medicated shower. *McCray, supra,* at p. 1211 (App. 37a). Sergeant Smith was told by the Warden of the Penitentiary to provide Respondent with his law books and legal materials while he was in the South Wing. However, these orders were not complied with immediately, because according to the unrebutted testimony of Sgt. Smith, the process of packing and moving personal belongings could take from two to three days to complete. *McCray, supra,* at p. 1211 (App. 37a). There was also testimony during the course of these trials that the Penitentiary had been forced to operate with a substantial shortage of prison personnel. *McCray, supra,* at p. 1211 (App. 37a). The District Court found that this disturbance, quite substantial according

to testimony of both Respondent and Sgt. Smith, prompted Sergeant Smith to remove Respondent McCray from the South Wing and place him in the isolated confinement area (I.C.). *McCray, supra,* at p. 1211 (App. 38a). The District Court further found that this measure was taken to avoid the possibility of causing a greater disturbance among the inmates.

In the process of transferring Respondent to the I.C. area, Respondent began shouting insults and threatening to do bodily harm to himself. Interpreting these threats as an indication of mental and emotional instability, and having personal knowledge of prior incidents involving inmates in isolation who had committed suicide, Sergeant Smith decided to strip McCray and remove the mattress from the cell. He testified that he felt it was better to subject Respondent to some discomfort rather than risk self-inflicted injury. *McCray, supra,* at p. 1211 (App. 38a).

Respondent's new cell, I.C. #5, was about 4-5 feet wide, 12-16 feet long, and 12 feet high. It had concrete walls, a concrete ceiling, and a concrete floor. At the front of the cell was a solid, metal door and a barred, grilled-type door, either or both of which could be closed. There was a toilet and a sink in the cell, and on the floor was a concrete slab about 9 feet long, 3 feet wide, and 12 inches high. Normally a mattress is placed on this slab to serve as the inmate's bed.

The District Court found that notification of one's immediate supervisor is the recommended procedure upon placing an inmate in the I.C. area. The District Court found as well that there was no evidence, other than the absence of any reference to Respondent in the log book during this period, to indicate that Sgt. Smith had not complied with this directive. *McCray, supra,* at

p. 1212 (App. 38a). Sergeant Smith testified that, although they try to log all occurrances, if there is considerable inmate activity, guards are often unable to make these entries. *McCray, supra,* at p. 1212 (App. 38a).

The next morning Sergeant Smith checked Respondent, discovered that he had defecated in a cup and smeared this excrement throughout the cell. Sgt. Smith then notified the psychologist, Mr. Musk, and decided to retain Respondent in I.C. for an additional day. The District Court found that while it appeared that Mr. Musk might not have examined Respondent before he was removed from the I.C. area, it was possible that this may have been due to the fact that November 21 was a Sunday. *McCray, supra,* at p. 1212 (App. 39a). Mr. Musk testified that he had no recollection of talking to Respondent about this specific incident, and had no record of such a meeting. *McCray, supra,* at p. 1212 (App. 39a). He indicated, however, that he had spoken to Respondent on at least ten occasions, but had made a record of only four of these visits. *McCray, supra,* at p. 1212 (App. 39a).

Respondent admitted that on several occasions he had requested to be placed in the I.C. area because it was more conducive to preparation of legal papers, but alleged that he was not given any showers during the two days that he was confined at this time. The records introduced at the trial clearly indicate that he was given a shower on November 20. *McCray, supra,* at p. 1212, 1216 (App. 39a, 46a). On November 22, 1971, Respondent was released from the I.C. area and returned to his cell.

SUMMARY OF ARGUMENT

The decade of the 1960's brought with it into the Federal Courts a vast increase in the number of cases filed by State prisoners relying upon 42 U.S.C. § 1983 seeking relief from alleged unconstitutional conditions of confinement. The number of petitions filed annually pursuant to § 1983 and, until recently, 28 U.S.C. § 2254, has risen dramatically from 1966 to the present date. In response to numerous suggestions for alternatives to judicial litigation regarding conditions of confinement, the State of Maryland established in 1971 the Inmate Grievance Commission of Maryland to hear all complaints regarding allegations of deprivations of constitutional and statutory rights of inmates confined to correctional institutions of the State of Maryland.

The Inmate Grievance Commission has five members independent of the Division of Correction and the Patuxent Institution, who hear and determine grievances following hearings at which the inmate has the opportunity to produce witnesses and documents, cross-examine witnesses, present evidence in his own behalf and be represented by counsel or counsel substitute. Following a hearing in cases which cannot be informally resolved, the Inmate Grievance Commission issues its findings of fact and order which is then reviewed by the Secretary of Public Safety and Correctional Services who may affirm, reverse or modify the order of the Inmate Grievance Commission. The Secretary then has the authority to order the appropriate official of the institution to carry out the action required by the Inmate Grievance Commission.

The United States District Court in this case found that: the jurisdiction of the Inmate Grievance Commission mirrored the traditional areas of § 1983 jurisdiction

in prisoner cases; the remedy was effective and adequate; and the resolution of prisoner grievances could be obtained more quickly before the Inmate Grievance Commission, which also provided a record for the District Court. Even though the Inmate Grievance Commission did not have the power to award money damages, the District Court found that it was still an effective and adequate remedy as the prisoner complaints were normally bound up with prison administration and the deferral of money damages until a decision was reached by the Inmate Grievance Commission did not render the remedy ineffective.

This Court held in *Monroe v. Pape, infra,* that § 1983 was enacted to override certain kinds of State law, provide a remedy where the state law was inadequate and provide a federal remedy where the state remedy though theoretically adequate, was not available in practice. This Court then stated that under these circumstances the federal remedy was supplementary to the state remedy and that the latter need not be first sought before the federal remedy was invoked.

The prior remedies sought to be invoked in *Monroe* were state judicial remedies which have traditionally been held not to require exhaustion. Following *Monroe,* in *McNeese v. Board of Education, infra,* this Court found that inadequate state administrative remedies did not have to be exhausted and similarly found inadequate remedies in *Damico v. California, infra, Houghton v. Shafer, infra,* and *Carter v. Stanton, infra.* In *King v. Smith, infra,* it was held that a sufficient constitutional challenge to a state regulation did not require exhaustion and, in *Wilwording v. Swenson, infra,* that exhaustion of state remedies was not a prerequisite to an action under 42 U.S.C. § 1983. *Wilwording,* however, appeared to have dealt with state

court remedies. The net result of all of these cases appears to be that state court remedies need not be exhausted prior to the filing of a § 1983 action and that the other cases did not require exhaustion of administrative remedies since the same were inadequate.

In *Preiser v. Rodriguez, infra*, this Court, in discussing conditions of confinement in a habeas corpus setting, indicated the strong policy considerations of comity regarding exhaustion of state remedies under § 2254 but those comments since these involved conditions of confinement were more applicable to § 1983 actions. However, this Court was not presented with an effective state remedy in *Preiser* which would have enabled it to redefine its prior opinions from *Monroe* to *Carter*.

While the cases on their face apparently establish the general principle that exhaustion could never be required in a § 1983 action, various exceptions have been engrafted upon that rule. When a plaintiff is subjected to prospective injury only, he is required to exhaust adequate state administrative remedies. Exhaustion has also been required where the suit could properly have been brought under another statute. Further, the requirement of exhaustion of federal administrative remedies provides support for a similar requirement under these circumstances.

The liberalization of the rule that exhaustion of state administrative remedies was not required seemed to come from a feeling that the individual states were not prepared to protect the interests of their citizens. However, the law is clear that the State of Maryland, by its actions, is sensitive to the rights of its citizens and is taking positive steps to provide a remedy to enforce those rights.

The Inmate Grievance Commission is a unique and demonstrably effective approach to prison litigation regarding conditions of confinement. However, the United States Court of Appeals for the Fourth Circuit, in this case, felt compelled, by prior decisions of this Court, to reject Maryland's argument and also indicated that it could not entertain the policy considerations which might justify a different result. While *stare decisis* is an important principle, there is no reason for its invocation in these circumstances where individuals have not arranged their affairs in reliance on the expected stability of decision as in the commercial field. It is clear from the findings of the District Court in this case that § 1983 is being abused by prisoners, that the number of civil rights complaints being filed are a burden on the administration of justice, that a large percentage of these are totally without merit, and that there is a need for alternatives.

Traditionally, exhaustion has been favored. For example, state remedies are not by-passed: when the State has an interest in regulation; to avoid strained relations with other agencies of government; to promote efficiency by pursuing a more flexible, less time consuming and expensive remedy; to provide a record and factual background; to allow the administrative agency to exercise its expertise; to provide an incentive to state administrative agencies to do their job; and to assure the courts that the decisions which reach them are final. Based on the traditional reasons for exhaustion, numerous proposals have been made regarding alternatives to litigation under § 1983. These include deferral to state agencies, a jurisdictional requirement, full exhaustion of adequate state administrative remedies, an exhaustion requirement based on the Administrative Procedure Act, and an exhaustion requirement where

the injury is to an individual only and not to a class of persons.

It is clear that policy considerations require exhaustion when there is an adequate and effective state administrative remedy. The traditional rules requiring exhaustion indicate that in these circumstances, exhaustion would be effective. Recent cases have indicated that prisoners are special classes of citizens who might be required to pursue adequate and effective state administrative remedies. The great number of civil rights complaints filed by state prisoners have had a detrimental impact upon the administration of justice in the United States Courts and the District Court noted that its effect was that legitimate complaints were being delayed. The third element of the legislative intent of § 1983 set out in *Monroe v. Pape* supports a congressional purpose to require an inquiry by the federal courts into the adequacy of the state remedy. Rather than precluding exhaustion, this would support the exhaustion requirement. Further, if the remedy provided by § 1983 is fully supplementary to any state remedy, then this Court's discussion of the three purposes of § 1983 in *Monroe v. Pape* is superfluous.

The United States Court of Appeals for the Fourth Circuit erred in this case when it disregarded the findings of fact by the District Court. It made no independent finding that the District Court was clearly erroneous and reinterpreted the facts as found by the District Court. The Fourth Circuit further erred when it incorporated an administrative directive of the Division of Correction of the State of Maryland into the Bill of Rights as a constitutional guarantee. Further, the Fourth Circuit erred when it made inconsistent findings of fact regarding isolated confinement (not per se cruel and unusual punishment) and confinement to

the mental observation area (per se cruel and unusual punishment) of the Maryland Penitentiary in spite of a finding by the District Court that the two confinement areas were similar and the purposes of confinement in the two instances were the same.

ARGUMENT

I.

EXHAUSTION OF ADEQUATE AND EFFECTIVE STATE ADMINISTRATIVE REMEDIES IS REQUIRED IN AN ACTION BROUGHT BY A STATE PRISONER PURSUANT TO 42 U.S.C. § 1983.

A. The Facts Disclose That the Inmate Grievance Commission of Maryland Represents an Adequate and Effective State Administrative Remedy for State Prisoners' Civil Rights Complaints.

1. *Historical Background*

> "Almost 2,000 years ago Juvenal asked: 'Sed Quis Custodiet Ipsos Custodes?' Who will watch the keepers themselves is still a question of critical importance, and the need of a proper solution is never more acute than when the rights of the individual are involved. A declared purpose of the federal constitution is to 'secure the Blessings of Liberty' to the people and their posterity, and under our philosophy of government the rights guaranteed by the constitution of the people are jealously guarded. Curtailment of them is to be permitted only to the extent necessary to maintain the fine balance between the rights of the individual and the rights of society." *State v. McCray*, 267 Md. 111, 114 (1972) (Footnotes omitted).

In State v. McCray, supra, at p. 146, the Court of Appeals of Maryland stated that the legislative intent of the Maryland Inmate Grievance Commission Act

was that state prisoners were to exhaust that remedy before filing actions in the state courts regarding conditions of confinement.

Although incarceration does not deprive an individual of ". . . his right to personal security against unlawful invasion . . .", *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944), it was not until the middle of the 1960's that intense scrutiny was directed toward the administration of penal institutions and the rights of inmates.

One of the earliest discussions of the rights of prisoners is found in *McCloskey v. Maryland*, 337 F.2d 72 (4th Cir. 1964), and the litigation has continued unabated to the present time.[2]

The overwhelming majority of complaints filed in prison administration cases invoke the jurisdiction of the District Courts pursuant to 42 U.S.C. §1983 (hereinafter §1983) and its jurisdictional analogue, 28 U.S.C. §1343, or under 28 U.S.C. §2254, alleging deprivations of constitutionally protected rights.[3] The initial trickle became a storm and the storm a tidal wave. The District Courts soon became overseers of state correctional institutions. Chief Judge Northrop

[2] See for example, *Landman v. Peyton*, 370 F.2d 135 (4th Cir. 1966); *Nolan v. Scafati*, 430 F.2d 548 (1st Cir. 1970); *Wright v. McMann*, 321 F. Supp. 127 (N.D.N.Y. 1970); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971); *Sostre v. McGinnis*, 442 F.2d 178 (2nd Cir. 1971); *Bundy v. Cannon*, 328 F. Supp. 165 (D. Md. 1971); *Clutchette v. Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971); and *Morris v. Travisono*, 310 F. Supp. 857 (D.R.I. 1970).

[3] Until *Preiser v. Rodriguez*, 411 U.S. 475 (1973), jurisdiction of complaints relating to conditions of confinement was accepted under either 42 U.S.C. §1983 or 28 U.S.C. §2254. After *Preiser, supra*, jurisdiction to test conditions of confinement vested almost exclusively under 42 U.S.C. §1983.

pointed out in *McCray v. Burrell*, 367 F. Supp. 1191 (D. Md. 1973) that in fiscal 1972, 3348 civil rights complaints were filed by state prisoners nationwide, an increase of 1435.8% over 1961 and and increase of 14.9% over 1971. For the first half of fiscal 1973, 1891 civil rights complaints were filed by state prisoners. Chief Judge Northrop also noted that at the Appellate level ". . . nearly 31% of the prisoner appeals filed nationwide were filed in the United States Court of Appeals for the Fourth Circuit in fiscal 1972. This percentage rose to 36.1% during the first half of 1973. More importantly, prisoner cases accounted for 38% of all cases filed with the Fourth Circuit in 1972, and for 45.3% for the first part of 1973." *McCray, supra*, at p. 1194 (App. 3a).[4]

Unfettered initial access to federal courts in pro se petitions pursuant to §1983 has led to the substantial backlog of cases alluded to by Chief Judge Northrop. The problem in determining the real issues involved requires the District Court to assume the role of

[4] In fiscal 1966, 218 civil rights complaints were filed by state prisoners in the United States courts nationwide. In contrast, this same figure has grown to 6,128 cases in fiscal 1975. Annual Report of the Director, Administrative Office of the United States Courts, (1975) at p. XI-49. In the District Courts of the Fourth Circuit alone, 1,184 civil rights petitions by state prisoners were filed during fiscal 1975. *ibid.*, at p. A-17. This figure compares significantly with 149 petitions filed in the First Circuit, 547 petitions filed in the Second Circuit, 443 petitions filed in the Third Circuit, 1,620 petitions filed in the Fifth Circuit, 388 petitions filed in the Sixth Circuit, 451 petitions filed in the Seventh Circuit, 492 petitions filed in the Eighth Circuit, 552 petitions filed in the Ninth Circuit, 236 petitions filed in the Tenth Circuit, and 66 petitions filed in the District of Columbia. *ibid.*, pp. A-17, A-19. See also McCormack, Wayne, *The Expansion Of Federal Question Jurisdiction And The Prisoner Complaint Caseload*, Wisc. L. Rev. 1975: 523, 535 Fn. 56, 57.

interpreter (sometimes requiring the insight of a seer or prophet), advocate, arbitrator, investigator, teacher and, in the final stages, the duty of a judge. See, generally, *McCray, supra.* Petitioners do not question the right of prisoners to obtain relief in federal court when their constitutional or statutory rights have been violated. What they submit is important is the point in time or the stage at which such suits should be allowed in federal court. In an address concerning prison conditions, Chief Justice Warren E. Burger stated:

> "We need not and should not abandon or even modify habeas corpus. What we need is to supplement it with flexible, sensible working mechanisms adapted to the modern condition of overcrowded and understaffed prisons . . . *a simple and workable procedure by which every person in confinement who has, or who thinks he has, a grievance or complaint can be heard promptly, fairly and fully.*" Address by Chief Justice Warren E. Burger to the National Association of Attorneys General, at Washington, D.C., February 6, 1970. See also *State v. McCray, supra,* at pp. 141-42 [Emphasis supplied].

The Fourth Circuit similarly commented on the problems and the proposed solutions.

> "While Maryland has recently established an Inmate Grievance Commission, Ann. Code of Md., Art. 41, § 204F (1971 Supp.), to determine and recommend the proper redress for meritorious grievances of inmates of Patuxent and other correctional institutions, we take judicial notice of the fact that the Commission is not yet fully operative. When it is, there will be time enough for the Supreme Court to determine if *Monroe v. Pape,* and, we, our own decisions, should be reexamined. That time is not the present." *Hayes v. Secretary,* 455 F.2d 798, 800 (4th Cir. 1972).

In his *Report on the Federal Judicial Branch — 1973,* 59 A.B.A.J. 1125, Chief Justice Warren E. Burger discussed the problem of prisoner litigation. He stated that in fiscal 1972 more than 16,000 petitions of various types were filed challenging validity of conviction and more than 4,000 additional cases were filed under the Civil Rights Act. After commenting on an obviously trivial complaint alleging the loss of seven packs of cigarettes, the Chief Justice suggested:

> "[W]e use some common sense and devise procedures that give prompt attention to valid complaints without calling on the federal judges and a train of other public employees to deal with three dollars worth of cigarettes." 59 A.B.A.J. at p. 1128.

He suggested certain alternatives:

> "1. Create a statutory administrative procedure for federal prisons to provide for hearing prison complaints administratively within the prison and require that these procedures be exhausted before any proceeding could be filed in federal courts. I believe many states would follow the federal example.
>
> 2. Establish formal grievance procedures in the State systems to hear prisoner complaints as a good many enlightened prison administrators have long since done. The American Bar Association commission dealing with correctional problems continues its important work, and I commend the subject of prisoner grievances to its attention.
>
> 3. Federal judges, acting within their existing authority, should consider referring habeas corpus and civil rights cases brought by prisoners for preliminary consideration by a United States magistrate sitting as a special master and reporting to the court." 59 A.B.A.J. at p. 1128.[5]

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[5] See also 2 Hofstra L. Rev. 345, 356 (1974) and 5 Rutgers-Camden L. J. 307, 318 (1974).

2. *The 1971 Act and the Experience Under the Act.*

In 1971, the Maryland General Assembly enacted Article 41, § 204F, Annotated Code of Maryland which created the Inmate Grievance Commission of Maryland. Encouraged by the Chief Justice of the United States, the Governor of Maryland, and the Attorney General of Maryland, the Inmate Grievance Commission was established to hear and resolve grievances of prisoners confined within the Division of Correction of the State of Maryland and the Patuxent Institution. 59 Opinions of the Attorney General of Maryland 438 (1974).

The Inmate Grievance Commission is an independent agency within the Department of Public Safety and Correctional Services consisting of five members appointed by the Governor with the advice of the Secretary of Public Safety and Correctional Services. Two members of the Commission are lawyers qualified to practice law in the State of Maryland; two are persons of knowledge and experience in one or more of the fields under the jurisdiction of the Department of Public Safety and Correctional Services and one member is from the public at large. § 204F(a) and *McCray, supra*, at p. 1202 (App. 18a-20a). At the present time, the Commission consists of James G. Boss, the Chairman and an attorney; James V. Bennett, an attorney, nationally known penologist and retired Director of the Federal Bureau of Prisons; Maceo M. Williams, a former correctional officer at Patuxent Institution, city probation officer and currently an official of the Baltimore Concentrated Employment Program (an anti-poverty program); Edgar A. Fulton, a retired insurance man, currently an industrial relations consultant to the United States Bureau of Prisons and a

member of the Maryland Advisory Board for Corrections, Parole and Probation; and Ralph S. Falconer, a retired employee of the Maryland Department of Parole and Probation. *McCray, supra*, at p. 1202 (App. 18a-20a) (T. 9-12).[6] Dene Lusby is the Executive Director of the Commission. Mr. Lusby is a graduate of the University of Maryland School of Law; he was an associate with the law firm of Weinberg and Green in Baltimore City, an Assistant State's Attorney for Baltimore City and senior trial attorney with the Federal Trade Commission. He was engaged in private practice from 1968 to 1972 prior to his appointment as Executive Director of the Inmate Grievance Commission (T. 26-27).[7]

The statute provides that "[A]ny person confined to an institution within the Division of Correction, or otherwise in the custody of the Commissioner of Correction, or confined to the Patuxent Institution, who

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[6] "T." refers to the transcript of testimony before the United States District Court for the District of Maryland in *McCray, supra*, contained in the Record on Appeal in this case.

[7] As the District Court noted, the Governor of Maryland has ". . . made every effort to appoint to the Commission individuals with knowledge in relevant areas and who are equipped with the perspicacity to make objective judgments, free from any institutional preconceptions of the facts of a particular in-prison incident." *McCray, supra*, at p. 1202 (App. 18a-20a).

Also, the Commission's 1974 budget was $102,200.00, an increase of $53,000.00 from its initial appropriation of 1972. As the budget includes $45,000.00 compensation for the 5 commissioners, it would cover approximately 120 days of service by each commissioner.

RESOURCE CENTER ON CORRECTIONAL LAW AND LEGAL SERVICES, A.B.A. COMMISSION ON CORRECTION FACILITIES SERVICES, MARYLAND INMATE GRIEVANCE COMMISSION at pp. 3-4. *(Ombudsman/Grievance Mechanism Profiles — No. 3, (1974)).*

has any grievance or complaint against any officials or employees of the Division of Correction or the Patuxent Institution, may submit such grievance or complaint to the Inmate Grievance Commission. . . ." § 204F(d). The statute further provides for preliminary review to determine if the grievance or complaint is wholly lacking in merit on its face without a hearing or findings of fact. § 204F(e). After hearing, if the grievance is found to be without merit, it is dismissed by the Commission. § 204F(f)(1). The latter two types of dismissals are the final decision for purposes of judicial review. If the Commission finds in its decision and order that the inmate's complaint is in whole or part meritorious, that Order is forwarded to the Secretary of Public Safety and Correctional Services who must, within fifteen days, either affirm, reverse or modify the order where he disagrees with the findings and conclusions of the Commission. The Secretary has the authority to require the appropriate official of the institution to accept the Decision and Order of the Commission and do whatever is necessary to implement the Commission's findings. § 204F(f)(2). The statute further gives the Commission access to any documentary evidence, authority to require by subpoena attendance and testimony of witnesses and production of all documentary evidence, and the right to administer oaths and affirmations. The inmate is afforded the right to appear before the Commission, to call witnesses subject to relevancy and materiality, to question witnesses and to be represented by an attorney at his own expense. The statute also provides for keeping records, a provision for hearings at the institutions and promulgation of rules and regulations. § 204F(g)-(k). Finally, judicial review is provided following the final decision of the Secretary in the circuit court where the institution is located, limited to a

review of the record to determine ". . . whether there was a violation of any right of the inmate protected by federal or State laws or constitutional requirements." § 204F(1).

The Inmate Grievance Commission is a separate agency within the Department of Public Safety and Correctional Services, and is an independent agency over which the Secretary of Public Safety and Correctional Services exercises only administrative control, that is, requirements as to budget and appointment of personnel. § 204F(a), (b) (T. 39, 80). Under the statute, the position of the Inmate Grievance Commission is similar to that of a trial court in which certain of its decisions are subject to mandatory review.

The Executive Director of the Inmate Grievance Commission testified in the District Court that complaints are always set for hearing unless withdrawn or resolved, a procedure which is successful in 35 to 40 percent of the cases (T. 28-29, 32). Cases are dismissed over which the Commission does not have jurisdiction, which are on their face without merit, which are withdrawn by the inmate and which are informally resolved (T. 33-34). See *McCray, supra,* at p. 1203 (App. 21a-23a). At the time of the hearing in the District Court, there were 752 administrative dismissals including those which had been informally resolved. *McCray, supra,* at p. 1203 (App. 21a-23a). Other than those instances, the Executive Director testified that a hearing is always set (T. 32). This procedure is not unlike that followed by the United States District Courts which have the right to dismiss a wholly frivolous in forma pauperis suit pursuant to 28 U.S.C. § 1915. See *Peterson v. Nadler,* 452 F.2d 754 (8th Cir. 1971) and *Garner v. Raulston,* 390 F.2d 644 (6th Cir. 1968). However, the Inmate Grievance Commission

does have broader and more flexible power to resolve these grievances.

Pursuant to Article 41, § 204F(e), the Commission and its Executive Director have the power to investigate complaints if necessary and informally resolve the same which negates the need for a hearing. A formal report of the investigation is not given to the Commission if the complaint cannot be resolved and the inmate is advised that an investigation is taking place (T. 23, 40, 51-53). Dene Lusby testified that he does not initially request the consent of the inmate when he initiates informal resolution because ". . . the complaints that I attempt to resolve informally are of a nature that there is no question in my mind that the inmate will be delighted to obtain the relief that he is seeking and that there is no confidentiality involved" (T. 56).

Mr. Lusby further testified that he prepares a file for the Commission which routinely contains no more than the necessary papers filed by the complainant. If an investigation takes place, and he so requests, the inmate is given the information from that investigation (T. 51-53).

An inmate is entitled to representation before the Commission by an attorney at his own expense, or by a law student, or by other inmates pursuant to the Rules and Regulations of the Inmate Grievance Commission. Chief Judge Northrop found that in 30% of the cases an inmate is represented. He further found that there was ". . . no need for the appointment of counsel, at the expense of the State, for the purpose of representing the inmate, as the hearing is solely remedial, not disciplinary or punitive, in nature." *McCray, supra*, at p. 1204 (App. 24a).

Article 41, § 204F(h), states that "The inmate shall have the right to appear before the Commission and shall have the opportunity to call a witness or a reasonable number of witnesses depending upon the circumstances and the nature of the complaint, subject to the discretion of the Commission as to the relevancy of the testimony and questions and the number of witnesses sought to be called. The inmate shall have the reasonable opportunity to question any witnesses who testify before the Commission. Such rights of the inmate shall not be unreasonably withheld or restricted by the Commission." The rules and regulations of the Inmate Grievance Commission, promulgated on November 30, 1971, provide that a complainant before the Commission may call such witnesses as have relevant testimony and may be available at reasonable times and that the Commission may limit the amount of testimony if it is cumulative or repetitive and may further remove the hearing to another place within the State or adjourn the hearing to hear further testimony or argument. Public Safety and Correctional Services, Rule 12.07.00.04 (2) (4). Further pursuant to Rule 12.07.00.04 (5), the Commission may require by subpoena the attendance and testimony of witnesses. The record before the District Court in *McCray, supra,* indicates that the Commission never used its subpoena power because there had never been an indication that it was needed; that there had never been a request for the issuance of a subpoena; and that no witness had ever refused to appear. *McCray, supra,* at p. 1203 (App. 22a-23a) (T. 20-23, 63). The District Court further found that inmates were not unreasonably restricted in their ability to call, cross examine, or require the attendance of witnesses. *Washington v. Boslow*, 375 F. Supp. 1298, 1301 (D. Md. 1974) (App. 62a-63a).

The Rules and Regulations of the Commission provide that a complainant may request the production of documents and records and that the Commission may require by subpoena the production of all documentary evidence. Rule 12.07.00.04 (2) (5). While an inmate does not have the right to full pre-trial discovery, the District Court found that there was no authority for holding that pre-trial discovery is an essential element of due process. "This Court finds that the lack of full discovery does not render the hearing 'unfair.' Cf. *Goldberg v. Kelly . . .*" *Washington, supra,* at p. 1301 (App. 63a). Witnesses before the Commission are not sworn on oath or affirmation as the Commission felt that the ". . . inmate feels much freer to present his case if he is not immediately warned of his problems as to perjury, and so forth. So, we have adopted that and followed that procedure of not requiring the sworn testimony with the feeling that it was for the benefit of the inmate" (T. 15, 22). *See also McCray, supra,* at p. 1204 (App. 24a).[8]

[8] "The plaintiff last asserts that the Inmate Grievance Commission Act does not accord the plaintiff a full and fair hearing within the meaning of the due process clause. In *McCray,* this Court discussed extensively the Inmate Grievance procedures and found that these procedures satisfied the requisites of due process. The plaintiff argues here, however, that at a hearing before the Commission he is unreasonably restricted in his ability to call and cross-examine witnesses and subpoena documents, and that he is unable to engage in pre-trial discovery. An inmate has the right to call a reasonable number of witnesses, subject only to the discretion of the Commission as to the relevancy or cumulative nature of the testimony, and this discretion cannot be unreasonably exercised by the Commission. Md. Ann. Code art. 41 §204F(h) (Supp. 1973). Any unreasonable refusal to allow an inmate to call a witness is reviewable in state court. Again, the inmate has the right to subpoena documents, and this right is subject only to the Commission's determination of the usefulness of the documents in deciding

Pursuant to § 204F (f)(2), if ". . . the Commission in its order finds that the inmate's complaint was in whole or in part meritorious, such order shall be promptly forwarded to the Secretary of Public Safety and Correctional Services. Within 15 days of the receipt of such an order, the Secretary by order shall affirm the order of the Commission, or shall reverse or modify the order where he disagrees with the findings and conclusions of the Commission." The Commission's decisions and orders are analogous to those decisions rendered by trial courts with the provision for a mandatory appeal. Should the Secretary fail to act, the decision and order of the Inmate Grievance Commission would be binding on the appropriate institution. The standards for exercise of power by the Commission, by the Secretary, and by the courts are clearly set out in § 204F (l) where jurisdiction and standards of review are limited to violations of rights protected by federal or state laws or constitutional requirements. This jurisdiction is comparable to the jurisdiction exercised by the Federal District Court in § 1983 actions.

Review by the Secretary of Public Safety is similar to that of a review by an appellate court of a trial court's findings of fact and conclusions of law. These powers were delineated in an Opinion of the Attorney General of Maryland to the Secretary of Public Safety, 59 Opinions of the Attorney General of Maryland, 438 (1974), where it was stated that:

> "Therefore, in those matters where the Inmate Grievance Commission finds that the grievance or complaint does amount to a deprivation of the

the merits of the claim. Public Safety and Correctional Services R. 12.07.00.04(2) (Inmate Grievances). This right may not be unreasonably restricted by the Commission, and any such action is reviewable in State court." *Washington, supra,* at p. 1301 (App. 62a-63a).

inmate's constitutional and legal rights and forwards its decision and order to the Secretary, the Secretary should review said decision and order in accordance with the provisions of subsection (f)(2) in the same manner as that of a court of review, namely: (1) accept the findings of fact as conclusive provided such findings contain a concise statement of conclusions upon each contested issue of fact; (2) determine whether the facts, as found by the Commission, support a determination that the inmate has been deprived of his constitutional and/or legal rights or that administrative relief is required; and (3) determine whether the Commission's order is appropriate. The Secretary is empowered, nevertheless, to remand the decision to the Commission for further proceedings in the event he finds that the matter should be further developed factually. In this regard, it should be pointed out that the Secretary's final decision is subject to judicial review upon appeal by the complaining inmate, whereas the officials and employees of the Division of Correction or of Patuxent Institution do not have such right."

Dene Lusby testified before the District Court that the inmate is notified of his right to appeal; that all inmates sentenced to imprisonment in the State of Maryland or referred to Patuxent Institution for diagnosis and evaluation are first sent to the Maryland Reception, Diagnostic, and Classification Center where they receive copies of an information sheet supplied by the Inmate Grievance Commission which clearly spells out the appellate process (T. 49-50).

At the time of the hearing in the District Court in *Washington v. Boslow*, *supra*, the time required to exhaust state administrative remedies was approximately 5 months, that is, the average time for decision

in those cases was 24.86 weeks.[9] More recent statistics indicate that that time factor has dropped considerably. For the one year period between October 17, 1974 and October 17, 1975 the amount of time which elapsed between the time of filing and the date of the Commission's order in cases which went to hearing was 94.9 days (13.56 weeks). National Association of Attorneys General, Committee on the Office of the Attorney General, *Correctional Services Newsletter*, Volume 4 Number 9, at p. 9 (Nov. 26, 1975).[10]

The District Court considered the factors necessary to determine whether to require exhaustion:

> "'Relevant to a resolution of whether or not exhaustion is required are considerations of the adequacy of the available state remedy, of whether or not it is really a remedy in fact as distinguished from being a remedy in theory, and of the extent of the state's interest in the subject matter of the litigation'." *McCray*, *supra*, at p. 1201 (App. 18a),

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[9] These figures are contained in the Appendix to Respondent Washington's Brief in the Fourth Circuits. (A. 275a-282a)

[10] The amount of time which elapsed between the date of filing of all grievances and final disposition is 40.6 days. The amount of time which elapsed between grievances which are administratively disposed of by the Executive Director from the date of filing and disposition is 12 days. The amount of time which elapsed as to grievances which are heard by the Commission between filing and date of hearing is 47.7 days. The amount of time which elapsed between the date of the hearing and the date of the order of the Inmate Grievance Commission is 47.2 days. *Correctional Services Newsletter*, *supra*, at p. 9.

See also, *Report Of The Study Group On The Caseload Of The Supreme Court*, 57 F.R.D. 573 (1972). In that article, the creation of a special non-judicial federal institution is advocated to try and settle complaints by prisoners of conditions of confinement. Three months was indicated as the amount of time this institution would have to resolve the grievances. 57 F.R.D. at pp. 586-88.

citing *Armsden v. Cataldo*, 315 F. Supp. 129, 131 (D. Mass. 1970).[11]

Regarding the above tests, Chief Judge Northrop stated that the court ". . . must analyze the theoretical due process adequacy of the state remedy, particularly from the standpoint of making sure the remedy does not contain the forbidden indicia of pre-judgment which renders exhaustion inappropriate." Secondly, the court must look at the ". . . remedy in practice, to see that it is being administered in an even-handed and fair manner." Thirdly, the court must determine the extent of the State interest in the subject matter of the federal litigation. *McCray, supra*, at p. 1201 (App. 18a).

The Commission's jurisdiction ". . . mirrors the traditional areas of §1983 jurisdiction in prisoner cases." See *McCray, supra*, at pp. 1202, 1208 (App. 19a-20a, 30a-32a). The District Court found that not only does the Statute mirror §1983 juridiction, but the Commission also has those equity powers exercised by

[11] A similar test for the adequacy of a state administrative remedy was a suggestion that the standard used should be that of the Civil Rights Act of 1968, that is, that state remedies be substantially equivalent to the federal remedies. *Limiting The §1983 Action In The Wake of Monroe v. Pape*, 82 Harv. L. Rev. 1486, 1497 (1969), (Hereinafter 82 Harv.L. Rev. at p. ____.)

In *Hayes v. Cape Henlopen School District*, 341 F. Supp. 823 (D. Del. 1972), the Court determined what due process rights were necessary prior to requiring exhaustion before state administrative bodies.

> "The right to hear and refute evidence presented against oneself, the right to present evidence on one's behalf, the right to call witnesses on one's behalf and the right to an impartial tribunal would most likely be the components of an administrative procedure sufficiently adequate to require exhaustion prior to commencing a suit under Section 1983 to vindicate the interference with a constitutional right." *Hayes, supra*, at p. 831.

the federal Courts. *McCray, supra*, at p. 1208 (App. 31a-32a). The testimony before the District Court was that the Commission had the jurisdiction to entertain class actions, grant injunctive relief, consider administrative matters and recommend changes in policies. *McCray, supra*, at pp. 1208-1209 (App. 31a-34a) (T. 42, 43, 45-47). Further, ". . . when a grievance requesting only damages is filed, a hearing is held for the purpose of, *inter alia*, determining the validity of the claim. If the grievance is meritorious in whole or in part, the Commission would then recommend procedures designed to prevent a recurrence of the situation." *Washington, supra*, at p. 1300 (App. 61a).

Chief Judge Northrop further found that the case load of federal judges had increased tremendously; that the length of time which elapsed from the date a prisoner filed a meritorious claim to the date of disposition was so great that often neither equitable nor legal relief was effective in protecting his rights; that these suits would continue to consume more and more of the federal courts' time with the resulting longer and longer delay; and because civil rights complaints filed in federal court are usually accorded lower priority; the ". . . powers of the Commission can, in most cases, be exercised considerably more quickly to remedy offensive patterns of official conduct than can the powers of the federal courts" and that the practical enforceability of orders is greater when the person rendering the order has the power to discipline or fire, did not make the average time from the filing of a complaint to its decision excessive. See *McCray, supra*, at pp. 1195, 1209 (App. 5a-7a, 33a-34a).

From the time a case is at issue until trial, the median time in the United States District Court for the District of Maryland is eleven months. *1973 Annual Report of Director, Administrative Director of the United States*

Courts. Although this is the median time in the District Court, prisoners habeas corpus and civil rights cases generally remain on the docket for much longer periods of time. Much of the time spent by the District Court is used to clarify the issues and the records and proceedings of the Commission will facilitate handling of the civil rights complaints when they are filed in the District Court.

> "While a determination of the Grievance Commission or the state courts on the merits of a prisoner's claim is not binding on this Court, a preliminary indication of validity serves as a valuable aid to a federal court. With 103 prisoner civil rights cases presently pending in the District of Maryland, a meritorious claim, of *which there are few*, in all likelihood cannot possibly be processed as rapidly as the State grievance procedure. Initial action by the Inmate Grievance Commission serves to alert this Court to a case in which constitutional deprivations are likely to have occurred, and this Court can move the case into its regular trial calendar.
>
> "A reasonably expeditious resolution of a prisoner's grievance can then be obtained since this Court will have before it a complete record of the controversy. Each hearing before the Commission is recorded on a Voice Writer and transcribed when an inmate seeks judicial review in the state courts. The transcript, coupled with the findings of the Commission and state courts, can be employed by this Court to arrive at the central issues for trial, thereby significantly reducing the trial time involved.
>
> "Thus the relief available from the Inmate Grievance Commission, although not exactly comparable to an award of damages, is critical to the welfare of the inmate, to the proper administration of the correctional institution, and to the expeditious resolution of the inmate's grievance." *Washington, supra*, at p. 1300 (App. 61a-62a). [Emphasis supplied.]

The District Court then found that the Inmate Grievance Commission was an effective remedy which ". . . assure[d] a detached and unbiased resolution of particular cases, culminating in judicial review of the administrative adjudications." *McCray, supra*, at p. 1202 (App. 19a-20a). After finding that the Inmate Grievance Commission of Maryland was an effective and adequate remedy the District Court held that:

> "However, the only thing which the imposition of this exhaustion requirement would do in these cases is to work a *postponement* of the ultimate award of damages in a meritorious § 1983 suit. . . . Of course, upon exhaustion of the State remedy, an inmate, in a proper case may still call upon the equity power of the federal court if the exercise thereof is needed in a particular case. If, of course, the remedy of damages is needed to make a prisoner whole again in a particular case, that remedy will likewise be available to the prisoner after he has exhausted the state administrative procedure. . . . Unlike the situation with respect to injunctive or other equity-type relief, there is no sense of immediacy attendant upon the awarding of money damages to redress particular deprivations of constitutional rights. . . . At any rate, it is clear that whatever postponement of the right to money damages under § 1983 is worked because of the imposition of an exhaustion requirement does not amount to a deprivation of the ultimate right to such relief in theory nor is it a deprivation in practical effect. This is true because an award of money does not require the immediate attention which ought to be given to demands for equitable relief, which in fact is given under Maryland procedure. The key point is that the ultimate right to damages is preserved during the complainant's pursuit of his state administrative remedies, and is not destroyed by a requirement that he resort to these remedies before bringing his federal action under § 1983.

> "Therefore, this Court concludes that before it will exercise jurisdiction over a prisoner § 1983 complaint, the inmate must exhaust the available state administrative remedy provided by the Maryland Inmate Grievance Commission procedure. Even if the complaint seeks only monetary damages, this avenue of relief should be exhausted. The claim for monetary damages is inextricably tied to prison regulations and disciplinary procedures. The Maryland Inmate Grievance Commission provides a forum with built-in judicial review which can more expertly sort out the meritorious from the frivolous." *McCray, supra*, at pp. 1208-1210 (App. 30a-35a).

See also *Washington v. Boslow, supra; Stokes v. McClellan*, Civil 73-1182-B, (D. Md. Memorandum and Order filed April 1, 1974) (App. 71a); and *Hyde v. Fitzberger*, 365 F. Supp. 1021 (D. Md. 1972).[12]

[12] The types of grievances and their percentages for fiscal 1974 received by the Inmate Grievance Commission are detailed below:

Type of Complaint Received	*Number*	*Percent*
Adjustment Team Appeals	299	36
Classification Actions	197	24
Property	112	13
Medical	47	6
Clerical Error	40	5
Non-physical Abuse	32	4
Living Conditions	22	2
Judicial	21	2
Parole	13	1
Commissary	9	1
Visitors	7	1
General Inquires	6	1
Physical Abuse	13	1
Mail	5	1
Legal Assistance	4	.5
Religious	4	.5
Reading Materials	3	.5
Non-penal Institutionalization	3	.5
TOTALS	837	100

Correctional Services Newsletter, supra, at p. 9.

B. PRIOR DECISIONS OF THIS COURT DO NOT FORECLOSE THE REQUIREMENT THAT A STATE PRISONER MUST EXHAUST MARYLAND'S ADMINISTRATIVE REMEDIES BEFORE BRINGING AN ACTION PURSUANT TO 42 U.S.C. §1983.

The District Court pointed out that following the passage in 1871 of the current 42 U.S.C. § 1983 the same ". . . received the narrowest of constructions. See, e.g., *Hemsley v. Myers*, 45 F. 283 (CCD Kan. 1891)." *McCray, supra*, at p. 1196 (App. 8a). It was also generally thought until 1961 that exhaustion of state administrative remedies was required prior to the filing of an action pursuant to § 1983. *See Dove v. Parham*, 282 F.2d 256 (8th Cir. 1960), and *Covington v. Edwards*, 264 F.2d 780 (4th Cir. 1959).[13]

1. *Monroe v. Pape*

In *Monroe v. Pape*, 365 U.S. 167 (1961), allegations of outrageous conduct on the part of certain Chicago police officers prompted this Court to re-evaluate and reinterpret 42 U.S.C. § 1983.[14] In discussing the history

[13] To the same effect see 82 Harv. L. Rev., *supra*, at pp. 1486-87, 1500; Pfeifer, Kristin, *Exhaustion Of State Administrative Remedies Under The Civil Rights Act*, 8 Ind. L. Rev. 565, 570 (1975); Sullivan, Barry, *Exhaustion Of State Administrative Remedies In § 1983 Cases*, 41 U. of Chi. L. Rev. 537, 542 (1974); *Exhaustion Of State Remedies Under The Civil Rights Act*, 68 Colum. L. Rev. 1201 (1968) and Davis, Bryan R., *State Prisoners' Suits; Proper Forum, Choice Of Remedy, And Effect Of Judgment*, 51 Tex. L. Rev. 1364, 1371 (1973).

[14] Although the facts of *Monroe* are fairly notorious, suffice it to say that 13 Chicago police officers broke into Monroe's house in the middle of the night, forced Monroe's family to stand naked in the middle of the living room while they ransacked each room, emptying drawers and ripping mattress covers. Subsequently, Monroe was detained on open charges for ten hours at the police station, was not taken before a magistrate and was not permitted to call his family

of § 1983, Justice Douglas noted that the Act grew out of a set of circumstances existing at the time of the passage of the Act which required redress.

> "'A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. * * *'." *Monroe, supra*, at pp. 172-173.

Quoting extensively from the debates surrounding the passage of 42 U.S.C. § 1983, Justice Douglas reiterated that the purpose of the statute was to provide a remedy ". . . against those who representing a State in some capacity were unable or unwilling to enforce a state law"; ". . . to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens . . . denied by the state agencies." *Monroe, supra*, at pp. 176, 180.[15]

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or attorney. The police officers had no arrest or search and seizure warrant. *Monroe, supra*, at p. 169.

[15] In *Sullivan, supra*, the author notes that Justice Brennan in *District of Columbia v. Carter*, 409 U.S. 418 (1973) indicated that the analysis of the purposes of the scope of § 1983 ". . . must take cognizance of the events and passions of the time at which it was enacted . . . .". *District of Columbia, supra*, at p. 425. *Sullivan, supra*, at p. 547. It is also noted in *82 Harv. L. Rev., supra*, that § 1983 was loosely and blindly drafted. 82 Harv. L. Rev. at p. 1507.

The purposes of the Act were to: (1) override certain kinds of state laws; (2) provide a remedy where state law was inadequate and (3) to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. *Monroe, supra*, at pp. 173-174. After stating the purposes of the Act, and the reasons for its enactment, this Court then pushed one step further when it stated that "[I]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe, supra*, at p. 183. It is clear from the context of the opinion in *Monroe* that although the factual situation therein did not fall within the aims of § 1983, the facts of that case required resolution in a federal court. The underlying thrust of the opinion in *Monroe* was that although there were state procedures in existence, they fell within the third aim of § 1983, that is, that a remedy adequate in theory was not adequate in practice. *Monroe, supra*, at p. 183, and *McCray, supra*, at pp. 1196-1197 (7a-11a).[16]

In his dissent, Justice Frankfurter concluded that § 1983 was meant to cover only those situations where an agent of the state acted pursuant to some state law, custom or usage. He concluded that as Illinois had held

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[16] *Pfeifer, supra*, indicated that there was nothing in *Monroe* which ". . . pertained to the exhaustion of state administrative remedies. The Court's decision that judicial remedies need not be exhausted was not a remarkable development or change in the existing law. Exhaustion of judicial remedies had generally not been required before relief was sought in a federal court." *Pfeifer, supra*, at p. 571. It is also interesting to note that the issue of exhaustion was not raised in the Respondent's brief in *Monroe* which indicated ". . . that their exhaustion argument had been given up by the time the case reached the Supreme Court." *Sullivan, supra*, at p. 543.

such intrusions as occurred in *Monroe* to be unlawful, the complaint would fail to state a claim under § 1983. His conclusion was premised on the fact that where state law shields the offender, it would appear unlikely that the state would set aside its own decisions. He reasoned that, as to the adequacy of state court protection, there was a distinction between ". . . injuries sanctioned by state law (as to which there can never be state-court redress, if at all, unless (1) the state courts are sufficiently receptive to a federal claim to declare their own law unconstitutional, or (2) the litigant persists through a tortuous and protracted process of appeals, after a state trial court has found the facts, through the state court system to the Supreme Court) and injuries not sanctioned by state law." *Monroe, supra,* at p. 249. See also pp. 255, 258. Historically, Justice Frankfurter concluded:

> "Rather, all the evidence converges to the conclusion that Congress by § 1979 [42 U.S.C. 1983] created a civil liability enforceable in the federal courts only in instances of injury for which redress was barred in the state courts because some 'statute, ordinance, regulation, custom, or usage' sanctioned the grievance complained of." *Monroe, supra,* at p. 237.

An immediate right to federal relief would exist only in those situations where the state would seek to shield the responsible individuals under the special barrier of state authority. *Monroe, supra,* at p. 239.

Justice Frankfurter further remarked in his dissent that the facts of *Monroe, supra,* were outrageous and implied that such may have been responsible for the decision of the Court. *Monroe, supra,* at p. 210. See also the dissenting opinion of Mr. Justice Black in *Goldberg v. Kelly,* 397 U.S. 254 (1970). Coupled with Justice

Frankfurter's clear indication that the decision in *Monroe* was based on its facts, and his discussion of the coverage of § 1983, it is submitted that *Monroe* did not forbid, at least in certain instances, exhaustion of state remedies such as are presented in the instant case.

In 82 Harv. L. Rev., *supra,* it is noted that the second and third purposes enunciated by Justice Douglas were amply supported by ". . . indications in the legislative history of some of the mischiefs at which the bill was aimed — state laws and practices effectively barring state court remedies for some persons deprived of federal rights and inability or unwillingness of states to enforce remedies on their books." 82 Harv. L. Rev. at p. 1489. The author then indicates that the fact situation in *Monroe* fell within none of these purposes and concluded that if § 1983 was to be fully supplementary, § 1983 ". . . is so broadened that the second and third purposes are completely subsumed and made redundant." 82 Harv. L. Rev. at pp. 1489-90. "The second and third congressional purposes — to provide a federal remedy where the state remedy is inadequate on its face or in practice — require application of the exhaustion principle for their fulfillment. If the threshold for federal intervention is the inadequacy of the state remedy, it is unreasonable to foreclose a state officer with the willingness and authority to correct the errors of his subordinates from doing so. If Congress sought to provide a federal remedy where the state remedy is not adequate in fact, it follows that the legislative intent requires adequate remedies to be exhausted. The third element of congressional purpose requires that the federal court inquire not only into the state remedy adequacy as it appears from statute and regulation, but also its adequacy in practice. Rather than precluding exhaustion, this element supports the exhaustion

requirement, since there is no reason to distinguish between adequate and inadequate remedies if the exhaustion principle is to be abrogated in all section 1983 cases." *Sullivan, supra,* at pp. 553-554.

In *Egner v. Texas City Ind. School Dist.*, 338 F. Supp. 931 (S.D. Tex. 1972), that court dealt with a civil rights action arising in the context of a school disciplinary case. In its discussion of the exhaustion doctrine, the Court reviewed the import of *Monroe v. Pape, supra.* After first setting out the three guidelines for defining the proper basis for § 1983 actions, Judge Noel referred to the language in *Monroe* that the federal remedy was supplementary to the state remedy.

> "There are *two ways to construe the foregoing quotation. First, it might be thought that the word 'supplementary' was used in the sense of 'supersessive' or 'subsuming', thus establishing a fourth comprehensive statutory purpose* in rendering the existence and adequacy of state remedies utterly immaterial. On the other hand, *reading in context, the quoted language can be taken as a reiteration of the third statutory purpose, to wit: the providing of a federal remedy where the state remedy, though theoretically available, was in practice illusory.* In *Schwartz v. Galveston Ind. School Dist.*, 309 F. Supp. 1034 (S.D. Tex. 1970)], this Court took the view and still holds the view that the second reading of the 'supplementary' language is the correct one for the following reasons:
>
> (a) This Court's thorough examination of the setting and legislative history of Section 1983
>
> > . . . make it clear that the *Act was not adopted to supercede state laws affording remedies for derelictions by state officials.* Rather, it was enacted to provide *a remedy only where one either did not exist or for some reason an existing remedy was unenforced or otherwise insufficient.*

> *Schwartz*, 309 F. Supp. at 1041." *Egner, supra*, at pp. 934-935. [Emphasis supplied]

Judge Noel further stated that:

> "To read the Court's 'supplementary' language as creating a fourth and virtually unlimited occasion for the application of Section 1983 would render superfluous and redundant its previous discussion of the second and third statutory purposes. If it is to be held that Section 1983 provides an all-encompassing federal constitutional remedy to be applied without regard to state remedies, then the substantial portion of the opinion devoted to discussing the limited curative purpose of the statute must be viewed as a mere scholarly exercise. Such a construction is, of course, unwarranted." Egner, supra, at pp. 935-936.

Finally, Judge Noel, in discussing *Askew v. Hargrave*, 401 U.S. 476 (1971) (per curiam), noted that ". . . the lower court's reliance upon *Monroe* was misplaced, the Supreme Court observed that, '*Monroe v. Pape* is not in point, for there "the state remedy, though adequate in theory, was not available in practice' . . . In view of this unambiguous statement in *Askew*, disputation about a possible supplementary fourth purpose should now be put to rest, for we have it on the highest authority that the Supreme Court itself views *Monroe* as falling within the third statutory purpose of Section 1983, which is to provide a federal forum only when a state remedy is adequate on its face but in practice unavailable." *Egner, supra*, at p. 936.[17]

[17] There have been numerous theories as to the reasons for the expansion of the non-exhaustion rule in § 1983 cases. *McCormack, supra*, posits three separate factors. First, he points to the revolution in individual liberties and the ". . . breakdown of traditional feelings that private citizens should not challenge the actions of their betters in government." Secondly, there is an indication of a preference for a federal

2. *Six Post-Monroe Cases*

Following on the heels of Monroe, supra, was *McNeese v. Board of Education*, 373 U.S. 668 (1963). In *McNeese*, this Court in a § 1983 action involving school boundaries held that failure to exhaust administrative remedies would not be required in a § 1983 action. But there, as this Court pointed out, the administrative official, the superintendent of schools could only ask the Attorney General to rectify the complaint by an appropriate proceeding in court, if he found the complaint to be meritorious. Therefore, the remedy was not adequate in that the protections afforded were so tenuous that it was not necessary to resort to them. *McNeese, supra,* at pp. 674-675. This Court also noted that the superintendent had no power to order corrective action and could only take steps leading to a remedy in state court, a requirement which was rejected in *Monroe, supra. McNeese, supra,* at p. 675.

> "Apparently no Illinois cases have held that the Superintendent has authority to withhold funds once he has received an affidavit from the district, even if he determines that the affidavit is false. In any event, the withholding of state aid is at best only an indirect sanction of Fourteenth Amendment rights. When federal rights are subject to such tenuous protection, prior resort to a state proceeding is not necessary." *McNeese, supra,* at p. 676. *See also* 82 Harv. L. Rev., *supra,* at pp. 1490, 1501.

Further, it is clear that the ultimate remedy in *McNeese* was judicial in that the request for action would have been from the superintendent of schools to the Attorney General to bring suit. See *Pfeifer, supra,* at pp. 570, 572-573.

In his dissent in *McNeese,* Justice Harlan indicated that the state procedure provided sanctions which should remove the case from the general rule that exhaustion is not required. *McNeese, supra,* at p. 678.

After *McNeese,* the situation appeared to be that resort to state court remedies was not required before filing a § 1983 action, nor was resort to a state administrative remedy required when that administrative remedy was inadequate and where the state administrator had no power to correct the wrong. *Kochie v. Norton,* 343 F. Supp. 956, 958-959 (D. Conn. 1972), *see also McCray, supra,* at p. 1197 (App. 9a-11a).

Following *McNeese, supra,* was *Damico v. California,* 389 U.S. 416 (1967) (per curiam) where this Court again reiterated that an action under § 1983 could not be defeated because relief was not initially sought under state law which provided an administrative remedy. *Damico, supra,* at p. 417. *McNeese* and *Monroe* were cited as controlling authority.[18]

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over a state forum to litigate these issues, the theory being that federal judges on the average are better than their state brethren due to selection processes. Thirdly, *McCormack* indicates that the social climate during the last twenty years has changed and that during the decade of the 1960's, certain federal judges ". . . began to develop a marked humanistic approach to law. Reflecting perhaps a broad societal yearning for simplicity and individualism, they began to balance the scales of justice back toward the individual from government and big business." *McCormack, supra,* at pp. 529-30.

[18] Other observations regarding the decision in *Damico, supra,* were that in the Opinion, the citation to *McNeese* was not to that part of the Opinion ". . . in which the *McNeese* Court gave its holding but those in which it interpreted *Monroe*" and that the words "an administrative" remedy were inserted by this Honorable Court in *Damico.*" 82 Harv. L. Rev. at p. 1491 and *Pfeifer, supra,* at p. 574. Further, as the suit was for injunctive and declaratory relief that the state statute was unconstitutional and since the administrative agency could not make such a declaration, the administrative remedy was inadequate. *Pfeifer, supra,* at p. 575.

In his dissent, Justice Harlan stated that he ". . . did not at the time and do not now fully understand the Court's opinion in *McNeese* the net result of the case as I see it was that the right to assert, in a federal court, that state officials had acted in a manner depriving the plaintiff of clear constitutional rights could not be delayed by the interposition of intentionally or unintentionally inadequate state remedies for the alleged discrimination." *Damico, supra,* at pp. 418-419. Justice Harlan further stated that in this case, Congress had specified a state forum for the resolution of grievances and that this decision should not have been made per curiam without briefs or oral arguments. *Damico, supra,* at pp. 419-420. Justice Harlan further explained his disagreement with *Damico* and his interpretation of *McNeese* as follows:

> "The source of my difficulty is a compound of the occasional use of language broader than was necessary or warranted by the facts as the majority viewed them, and of my own disagreement, with the majority's view of the facts. In Monroe v. Pape, 385 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492, in an opinion which I joined, the Court declared that one complaining of unlawful search and seizure by state officials could sue them in a federal court under 42 U.S.C. §1983, notwithstanding the availability of similar remedies under state law. That case did not say that one who is engaged in a course of dealing with an administrative agency may bypass the orderly procedures established by that agency and the procedures for review of agency action and sue its members individually at any stage. In *McNeese* it was the prevailing view, with which I disagreed under the circumstances, that the administrative procedures established by the State were inadequate for the vindication of federal rights. Reading *Monroe* to have interpreted 42 U.S.C. §1983 'to provide a remedy where state law was inadequate, [and] "to provide a federal

> remedy where the state remedy, though adequate in theory, was not available in practice",' 373 U.S., at 672, 83 S. Ct., at 1435, the Court concluded that '[w]hen federal rights are subject to such tenuous protection, prior resort to a state proceeding is not necessary.' Id., at 676, 83 S. Ct., at 1438.
>
> The majority opinion in *McNeese* also, however, attributed to *Monroe* the establishment of the principle that 42 U.S.C. §1983 provides a 'supplementary' remedy to any a State might have. *This language is now interpreted by the Court to mean that there can be no requirement that a person dealing with an administrative agency continue to deal with it in an orderly fashion, no matter how adequate his remedy there. If this is what the majority opinion in McNeese meant to say, its dictum was gratuitous both in the sense that it was not compelled by the facts as the court viewed them and in the same sense that it was an incorrect interpretation of Monroe." Damico, supra,* at p. 419 [Emphasis supplied.]

As Judge Newman pointed out in *Kochie, supra,* 343 F. Supp. at p. 959, the Supreme Court's page reference to *McNeese* in *Damico* was to that part of the opinion where the Supreme Court had rejected the requirement of pursuing state court remedies. Judge Newman further stated that:

> "Even if the interpolation of the word 'administrative' was warranted, it could at most refer to the type of administrative remedy rejected in the latter portion of the *McNeese* opinion — namely, a remedy which is either beyond the power of the administrator or which cannot provide adequate protection to the right allegedly impaired." *Kochie, supra,* at p. 959. See also *McCray, supra,* at p. 1197 (App. 9a-11a).[19]

[19] "An additional justification for prompt recourse to the federal courts in *Damico* was the fact that the welfare program in question was, at bottom, federal." 68 Colum. L. Rev. at p. 1207, fn. 43.

In *King v. Smith*, 392 U.S. 309 (1968), which involved a challenge to the constitutionality of Alabama's "substitute father" regulation, this Court disposed of the issue of exhaustion in a footnote. 392 U.S. at p. 312, n. 4 The rational of the decision was that remedies did not have to be exhausted when there was a substantial constitutional challenge sufficient to require the convening of a three-judge court although there was an implication in that case that exhaustion might be required in a case of less significance. *See* 82 Harv. L. Rev. at p. 1500 and *Pfeifer, supra.*, at p. 575.[20]

Houghton v. Shafer, 392 U.S. 639 (1968), involved a state prisoner who filed suit pursuant to § 1983 and had been required to exhaust state administrative remedies. This Court held that ". . . exhaustion of only administrative remedies would not be required of a § 1983 prisoner-plaintiff where the state Attorney General, the officer to whom ultimate administrative appeal was to be taken, had already indicated his prejudgment of the case, thereby making resort to the administrative remedy an exercise in futility." *McCray, supra*, at p. 1197 (App. 9a-11a). *See also Kochie, supra*, at p. 959. This Court then added its admonition citing *Monroe, supra*, that resort to such remedies was unnecessary. *See also* 82 Harv. L. Rev. at p. 1501; *McCormack, supra*, at p. 541 and *Pfeifer, supra*, at pp. 575-576.[21]

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[20] "If such a hint does indicate some flexibility about the no-exhaustion rule, the Court might be willing to accord weight to factors other than importance of the constitutional questions raised, such as an especially strong state interest in having state administrative remedies resorted to first." 82 Harv. L. Rev. at p. 1501.

[21] While this Court noted ". . . *Houghton's* elimination of the exhaustion requirement . . .", there was a ". . . careful examination of the adequacy of the administrative remedy. Since the remedy was inadequate, the plaintiff was not required to exhaust it." *Pfeifer, supra*, at p. 565.

Wilwording v. Swenson, 404 U.S. 249 (1971), involved an action filed by state prisoners under 28 U.S.C. § 2254. This Court held that the complaints regarding conditions of confinement stated a good cause of action pursuant to § 1983 without requiring exhaustion of state administrative remedies. This Court, however, ostensibly reaffirming the non-exhaustion doctrine, inserted the usual reference to the probable futility of those remedies.

> "[S]tate prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs. *Houghton v. Shafer*, . . . There an inmate's challenge to the confiscation of his legal materials without first seeking administrative redress was sustained. *Although the probable futility of such administrative appeals was noted, we held that in 'any event, resort to these remedies is unnecessary'.*" *Wilwording, supra*, at pp. 251-252. [Emphasis supplied.]

Although in *Wilwording* the remedies requiring exhaustion appear to have been state court remedies, this Court in quoting from *Marino v. Ragen*, 332 U.S. 561, 568 (1947), stated:

> " 'The exhaustion-of-state-remedies rule should not be stretched to the absurdity of requiring the exhaustion of * * * separate remedies when at the outset a petitioner cannot intelligently select the proper way, and in conclusion he may find only that none of the [alternatives] is appropriate or effective'." *Wilwording, supra*, at p. 250.

Chief Justice Burger, in his dissent, admonished the majority that summary reversal in this case was inappropriate and further stated that "The Court assumes without citation of authority that further resort to state remedies would be futile; the District Judge, far more familiar than we with the local

situation, thought otherwise." *Wilwording, supra,* at p. 253.

In *Carter v. Stanton,* 405 U.S. 669 (1972) the issue to be determined was the constitutionality of an Indiana welfare regulation. This regulation required an individual seeking public assistance due to the unavailability of the spouse to wait six months prior to receiving benefits. Without exhausting an administrative remedy, suit was brought and a three-judge court dismissed the complaint holding that no substantial federal question had been presented to them and that they therefore lacked jurisdiction. This Court held under the authority of *Damico,* that this was ". . . an indistinguishable case, likewise establish[ing] that exhaustion is not required in circumstances such as those presented here." *Carter, supra,* at p. 671. It is clear that as in *Damico,* where the constitutionality of a statute was the primary issue, this Court felt that the administrative remedy was inadequate. See *Pfeifer, supra,* at p. 576.

3. *Synthesis Of These Holdings*

While the net result of *Monroe, McNeese, Damico, King, Houghton, Wilwording,* and *Carter* is that exhaustion of state court remedies is not required, this conclusion is not surprising. It has always been thought that exhaustion of *judicial* remedies was not required under § 1983. See *Pfeifer, supra,* at p. 571. To say, however, that this Court never intented to require exhaustion of administrative remedies in § 1983 cases would be the say that the numerous references in the opinions and dissents as to the futility of the administrative remedies are mere surplusage.

> "Thus while some of the language of the decisions in *Damico, Houghton* and *Wilwording* seems to suggest that state administrative remedies never need be exhausted before § 1983 complaints can be litigated in a federal district court, their holdings are far more limited. The main holding of these decisions is that state *court* remedies need not be exhausted. It was that holding which the Second Circuit felt obliged to follow in *Rodriguez v. McGinnis,* 456 F.2d 79 (2d Cir. 1972). Where *administrative* remedies have been involved, a requirement of their use has been rejected in narrow circumstances: where the constitutionality of a regulation is challenged, *Damico v. California, supra;* where the administrator alone cannot remedy the grievance, *McNeese v. Board of Education, supra;* and where resort to the administrative remedy is futile, *Houghton v. Shafer, supra.*
>
> Indeed the Court itself has viewed *Damico* and *McNeese* as dispensing with exhaustion requirements when the constitutional claim presented is 'substantial.' *King v. Smith,* 392 U.S. 309, 312, n. 4, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968). *See also Askew v. Hargrave,* 401 U.S. 476, 478, 91 S. Ct. 856, 28 L. Ed. 2d 196 (1971). *No decision of the Supreme Court squarely holds that the complaint of a state prisoner, which, if well-founded, is capable of prompt and complete redress by an administrative official can be brought directly into a federal district court under § 1983 without any attempt at exhaustion of administrative remedies. I am reluctant to believe the law is otherwise, at least until dismissal for failure to exhaust that type of administrative remedy is held to be improper."* *Kochie, supra,* at pp. 959-960.[22] [Emphasis supplied].

[22] The line of cases from *Monroe* through *Carter* have been extensively discussed by the courts. Many of the courts which have held exhaustion to be a viable jurisdictional prerequisite to § 1983 cases have indicated that *Monroe,* et al., dealt with situations without adequate state administrative remedies.

> "A reading of these cases indicates that in *Monroe* and in *McNeese* the available state administrative remedies

4. *Preiser v. Rodriguez: A New Departure*

Although the issue of exhaustion of adequate administrative remedies may appear to have been foreclosed *by Wilwording* and *Carter, Preiser v. Rodriguez*, 411 U.S. 475 (1973) reopened the door. As noted by the District Court, in *McCray*, the summary treatment of the difficult question of administrative exhaustion by this Court led to eight separate opinions in *Rodriguez v. McGinnis*, 456 F.2d 79 (2d Cir. 1972), which involved a § 1983 action against prison officials for loss of good time accrued while incarcerated in the New York prison system. *McCray, supra*, at p. 1197 (App. 9a-11a). On

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were not, as a practical matter, bona fide useful remedies which could afford actual relief to the plaintiff in either of those cases. Both of these cases were further complicated by a factual basis strongly suggestive of racial discrimination which, of course, is not involved herein. *Houghton* clearly involved a situation where the state remedy was inadequate and illusory. *Damico* simply restated *Monroe* and *McNeese* without discussion or analysis." *Armsden v. Cataldo*, 315 F. Supp. 129, 131 (D. Mass. 1970).

In *Egner, supra*, the Court stated that the party seeking dismissal in those cases failed to demonstrate the adequacy and availability of state remedies. "The failure of the defendants to meet this burden in *Monroe* was clearly implied by the paragraph of that opinion in which the troublesome 'supplementary' language appears. 365 U.S. at 183." *Egner, supra*, at p. 937.

> "The failure of the defendants to demonstrate the adequacy and availability of state remedies is a unifying theme of such cases as *Houghton v. Shafer* . . . dealing with the application of prison rules, *Damico v. California* . . . involving welfare eligibility, and *McNeese v. Board of Education* . . . concerning racial segregation in public schools. In *Houghton* and *McNeese*, the Court either expressly or by clear implication found the state remedy to be inadequate. *Damico* involved welfare, an essentially federal subject matter." *Egner, supra*, at p. 928, citations omitted. See also *Hayes v. Cape Henlopen School District, supra*, at p. 830.

appeal, this Court held that when a state prisoner challenges the fact or duration of his physical confinement and requests immediate or more speedy release, his sole remedy is habeas corpus. *Preiser, supra*, at p. 499. Although this Court relied on *Monroe* and its progeny for the proposition that a civil rights plaintiff need not seek redress in a state forum, there was, in reality, no discussion of the question of exhaustion of available state administrative remedies pursuant to § 1983 nor was this Court presented with an adequate administrative remedy. *Preiser, supra*, at pp. 477-79. *See also McCray, supra*, at p. 1198 (App. 11a-13a). This Court discussed in *Preiser* the traditional role of habeas corpus and the strong policy considerations of federal-state comity which mandated its decision in *Preiser* to require exhaustion.

> "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. *What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State.* Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems. *Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative*

bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances. In New York, for example, state judges sit on a regular basis at all but one of the State's correctional facilities, and thus inmates may present their grievances to a court at the place of their confinement, where the relevant records are available and where potential witnesses are located. The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." *Preiser, supra,* at pp. 491-92 [Emphasis supplied.] *See also McCray, supra,* at p. 1198 (App. 11a-13a).

It is Petitioners' position that *Monroe* and its progeny held that exhaustion of State judicial and inadequate administrative remedies was not required by a state prisioner under §1983. *Preiser* has indicated, however, that if responsible States develop responsible programs such as that presented before this Court today, exhaustion of these programs would be required.[23]

II.

EXCEPTIONS RECOGNIZED BY FEDERAL COURTS TO THE PRINCIPLE THAT EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES IS NOT REQUIRED IN AN ACTION PURSUANT TO § 1983 INDICATE THAT A SIMILAR EXCEPTION SHOULD APPLY IN THIS CASE.

There are two main areas in civil rights litigation under § 1983 where the current case law requires exhaustion: (1) where the injury is prospective; (2) and

[23] See also, *Sullivan, supra,* at p. 547; 2 Hofstra L. Rev. at p. 356 and *Davis, supra,* at p. 1394.

where the case is properly brought under another statute.[24]

A. Prospective Injury

In *Toney v. Reagan,* 467 F.2d 953 (9th Cir. 1972), probationary teachers were notified in November, 1970 that their employment would be terminated as of the fall of 1971. The teachers filed state administrative grievances in December, 1970 and in January, 1971, filed their action in District Court. The United States Court of Appeals for the Ninth Circuit, while citing the general rule that exhaustion is not required in a § 1983 action, and that the same was supplementary citing *Monroe,* held, however:

> "Indeed, if the administrative remedy designed to forestall the threatened discharge was 'adequate', then 'refusal to make use of it constituted an acceptance of the discharge and prevents [appellants] from establishing a claim under the Civil Rights Act.'" *Toney, supra,* at p. 957.

See also Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969). Further, citing *Monroe* and its progeny, that court held

[24] *Pfeifer* has indicated his current conclusions derived from *Monroe* and the subsequent cases which followed it. They are that exhaustion will not be required where: (1) the administrative remedy is inadequate; (2) a statute is attacked on its face as unconstitutional or if a constitutional right is involved; (3) where the only administrative remedy is of a judicial nature; or (4) the agency is unconstitutionally constituted.

He further states that exhaustion will probably be required when: (1) the plaintiff is threatened with only a prospective or future deprivation of rights by a proper agency; (2) the claim could have been brought under another statute which shows an intent on the part of Congress to require exhaustion; and that (3) ". . . some courts will shun any hard and fast rules and will adopt a pattern of flexibility in applying the exhaustion doctrine." *Pfeifer, supra,* at pp. 584-85.

that ". . . prospective, as distinguished from retrospective, state administrative remedies must be exhausted in order to state a claim upon which relief can be granted under the Civil Rights Act." *Toney, supra,* at p. 956. *Toney* also discussed the fact that the grievance procedures in that case would not operate to rectify a wrong which had already occurred, but was a method of ". . . forestalling a threatened deprivation of rights which was not to transpire for several months." *Toney, supra,* at p. 956. Similar expressions in cases of employment of teachers indicate that exhaustion of administrative remedies might be required prior to filing a § 1983 action. See *Horton v. Orange,* 464 F.2d 536 (4th Cir. 1972); *Barker v. Hardway,* 399 F.2d 638 (4th Cir. 1968); *Acanfora v. Board of Education,* 491 F.2d 498 (4th Cir. 1974), *cert. denied* 419 U.S. 836 (1974);[25] and *Mondell v. Mayor & City Council,* 356 F. Supp. 76 (D. Md. 1973).

Similarly, in *Pope v. State Bar of Texas,* 480 F.2d 998, 1003 (5th Cir. 1973), the Court of Appeals for the Fifth Circuit required exhaustion when the state administra-

[25] In *Acanfora, supra,* at p. 503 the Fourth Circuit stated that, "[W]e do not, however, approve of the parties' failure to use administrative remedies to resolve their differences. An effective grievance procedure might have eliminated this expensive, protracted litigation." Similarly, in *Mondell, supra,* Judge Frank A. Kaufman, in approving the parties' use of the grievance procedures, stated that ". . . there is a substantial practical reason for this Court to postpone hearing Mondell's claims for reinstatement, back pay and damages until she has received her hearing before the Commission and has learned that body's decision. Although the issues of reinstatement and back pay will not necessarily be resolved by the Commission, the facts found by the Commission and the testimony adduced before it may well be relevant and material in this case if this Court subsequently is required to decide Mondell's First Amendment claims seeking reinstatement, back pay and damages." *Mondell, supra,* at pp. 78-79.

tive remedies were adequate in order to assure that a § 1983 action was ripe for adjudication or that the decision of the institutional authority was final so that the same is ripe for adjudication. *See Stevenson v. Board of Education,* 426 F.2d 1154, 1157 (5th Cir. 1970), cert. denied 400 U.S. 957 (1970). In *Raper v. Lucey,* 488 F.2d 748 (1st Cir. 1973), an applicant for a motor vehicle operator's license in Massachusetts filed suit pursuant to § 1983 to correct alleged deficiencies in the Massachusetts administrative procedures governing motor vehicle license applications. While adhering to the principle that exhaustion is not required in § 1983 cases, the court acknowledged that certain of their recent cases regarding school administration would seem to be out of step with *Monroe* and its progeny and stated:

> "To the extent that they indicate a general or automatic requirement of administrative exhaustion in § 1983 cases, we note our disapproval and signal our acceptance of the earlier cited line of cases. But we adhere to our view of the necessity for ripeness to the extent that there must be at least some definitive administrative or institutional determination before a § 1983 action may arise. We subscribe to the view expressed in *Stevenson v. Board of Education,* . . . that we should not 'intervene in school personnel and management problems without requiring such prior reference to local institutional authority as may be necessary to assure that the action complained of is final within the institution in the sense that it is ripe for adjudication.'" *Raper, supra,* at p. 751.

United Automobile, Aerospace, & Agr. Imp. Wkrs. of Am. v. State Farm Insurance Co., 350 F. Supp. 522 (N.D. Ill. 1972), involved a civil rights action against an insurance rating board pursuant to § 1983 alleging discrimination in the setting of insurance rates. The district court in that case concluded that plaintiffs

would not be entitled to relief until they had exhausted their state administrative remedies under the Illinois Insurance Code. After an extensive review of *Monroe*, the court stated:

> "Where a plaintiff (1) is not challenging the constitutionality of a statute on its face, (2) can challenge the complained of activity in a state proceeding on a basis different in nature than his basis in a federal court, and (3) has adequate administrative, not judicial, remedies available, he will be required to exhaust his state remedies before proceeding in a federal court." *U.A.W., supra*, at p. 527.

Although *U.A.W., supra*, relied on *Metcalf v. Swank*, 444 F.2d 1353 (7th Cir. 1971) which was subsequently reversed and remanded by this Court in light of *Carter v. Stanton*, 405 U.S. 669 (1972), the opinion of this Court in *Carter, supra*, relied on *Damico, supra*, "an indistinguishable case" which "establishes that exhaustion is not required in circumstances such as those presented here. Cf. *McNeese v. Board of Education*, . . .; *Monroe v. Pape*, . . ." *Carter, supra*, 405 U.S. at p. 671. Thus the general principles cited by the court in *U.A.W.* that there are certain cases which may require exhaustion before a § 1983 action is brought in federal court is still viable.

Gibson v. Berryhill, 411 U.S. 564 (1973) involved a suit by licensed optometrists who sought an injunction under § 1983 to stop hearings before the Alabama Board of Optometry who had charged those optometrists with unprofessional conduct.

This Court held that the plaintiffs in *Gibson* were not required to exhaust state administrative remedies as they found on the record that the same ". . . was so defective and inadequate as to deprive the plaintiffs of

due process of law." *Gibson, supra*, at p. 570. While adhering to the general rule that state administrative remedies need not be exhausted under § 1983, this Court stated:

> "*Whether this is invariable the case even where*, as here, a license revocation proceeding has been brought by the state and is pending before one of its own agencies and where the individual charged is to be deprived of nothing until the completion of that proceeding, *is a question we need not now decide*; for the clear purport of appellees' complaint was that the State Board of Optometry was unconstitutionally constituted and so did not provide them with an adequate administrative remedy requiring exhaustion. *Thus, the question of the adequacy of the administrative remedy, an issue which under federal law the district court was required to decide, was for all practical purposes identical with the merits of appellees' law suit.*" *Gibson, supra*, at pp. 574-75. (Footnotes omitted.) [Emphasis supplied.]

Finally, Justice Marshall, with whom Justice Brennan joined, wrote a short concurring opinion where he said that he joined in the opinion of the Court ". . . except insofar as it suggests that the question remains open whether plaintiffs in some suits brought under 42 U.S.C. § 1983 may have to exhaust administrative remedies." *Gibson, supra*, at p. 581.

Although the Inmate Grievance Commission is, in essence, a "retrospective" as opposed to "prospective" remedy, it has the latter capability as its jurisdiction ". . . mirrors the traditional areas of §1983 jurisdiction in prisoner cases." *McCray, supra*, at pp. 1202, 1208. (App. 19a-20a, 30a-32a).[26]

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[26] While *Gibson* has been severely limited by decisions and its commentators to instances of prospective injury or situations where the individuals right's are protected during

B. Other Exceptions

As *Pfeifer* notes, there appears to be a trend toward requiring exhaustion of adequate state administrative remedies when a civil rights plaintiff should have brought his action under another statute which would show an intent on the part of Congress that exhaustion is to be required as in *Preiser, supra*. See *Pfeiffer, supra*, at p. 580 (Pfeifer's comments regarding the use by some of the District Courts of flexibility in applying the exhaustion doctrine are collected in his Comments at p. 585.)

Further support may be found for exhaustion of effective and adequate state administrative remedies in

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the state administrative process, it still involves the same rationale as the cases from *Monroe* to *Carter*, that is, inadequate state administrative remedies. See *McCormack, supra*, at p. 541; *Pfeifer, supra*, at p. 581; and *Sullivan, supra*, at pp. 538, 547.

In *Brooks v. Center Township*, 485 F.2d 383 (7th Cir. 1973), plaintiffs alleged that defendants unconstitutionally stopped welfare and food payments. The complaint was dismissed for failure to exhaust, but on appeal the Seventh Circuit held that the complaint should not have been dismissed for failure to exhaust but indicated a qualification on the non-exhaustion doctrine under *Gibson, supra*.

> "The court however qualified that statement by saying it need not decide '[w]hether this is invariably the case.' In a factual situation such as the one there, where the state remedy was initiated and pending and the individual would be deprvied of nothing until completion of the state proceeding, the question of exhaustion 'remains open.' *Gibson* is inapposite here because no Indiana state proceeding was or is pending with which a district court decision would interfere." *Brooks, supra* at p. 386.

In *Gibson, supra*, this Honorable Court in note 14 stated that "state administrative remedies have been deemed inadequate by federal courts and hence not subject to the exhaustion requirement, on a variety of grounds." *Gibson, supra* at p. 575. The reasons discussed included delay or bias by the administrative agency or that the administrative agency was not empowered to grant effective relief. *Cf. McNeese, supra*.

certain requirements that plaintiffs in federal actions claiming relief similar to that claimed under § 1983 are required to exhaust any adequate federal administrative remedies.

The District Court stated that ". . . to require state prisoners to exhaust such an administrative remedy does not hold them to a stricter standard of exhaustion than other civil rights petitioners, as *Wilwording* seems to suggest." *McCray, supra*, at p. 1200 (App. 16a). It is obvious that the District Court did not rely principally on federal exhaustion, but used it to indicate the anomaly existing under § 1983, an Act passed in 1871 to correct unchecked lawlessness. See *Monroe*, and the dissenting opinion in *Preiser*.

The District Court indicated that *McGaw v. Farrow*, 472 F.2d 952 (4th Cir. 1973) required soldiers of the United States Army stationed in Virginia to exhaust administrative remedies provided by the military prior to filing an action in the District Court for alleged violations of constitutional rights. In *McGaw, supra*, it was alleged that plaintiffs had been denied constitutional rights when the base commander refused to permit them to use the chapel for a special service. The Fourth Circuit held that as military procedures provided a method of appeal, plaintiffs in that case were required to exhaust that administrative remedy. *McGaw, supra*, at p. 958.[27]

Kochie v. Norton, supra, was a suit by a federal prisoner against the Warden of the Federal Correctional

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[27] Similar cases holding that exhaustion of administrative remedies are required in this situation are *United States ex rel. Taylor v. Fritz*, 446 F.2d 36, 37 (8th Cir. 1971); *Gonzales Salcedo v. Lauer*, 430 F.2d 1282, 1283 (9th Cir. 1970); *Karpinski v. Resor*, 419 F.2d 531, 532 (3rd Cir. 1969); *United States ex rel. Berry v. Commanding General*, 411 F.2d 822, 824 (5th Cir. 1969); and *Sohm v. Fowler*, 124 U.S. App. D.C. 382, 365 F.2d 915, 917 (1966).

Institution at Danbury, Connecticut, alleging constitutional deprivations in the nature of civil rights violations. After reviewing the applicable decisions, that court held that a federal prisoner must exhaust his administrative remedies, even though the grievance procedure was rudimentary. *Kochie, supra*, at p. 961. It is interesting to note, however, that Judge Newman in *Kochie, supra*, at p. 960, further stated that his comments were ". . . not to suggest that requiring exhaustion of administrative remedies should be an unyielding principle. Consideration should always be given to the gravity of the matter complained of and the realistic availability of a prompt and effective administrative remedy." It is clear that Judge Newman premised his decision and his discussion of § 1983 actions on the availability of an adequate and effective administrative remedy. In both cases, he would hold that exhaustion would be required.

The District Court, in *McCray* in discussing the requirement of exhaustion by military personnel, stated that there was a need to protect against violations of constitutional rights whether the defendant was in the Army, a state prisoner or, as Judge Newman stated, a federal prisoner.

> "Thus, if a defendant is required to exhaust administrative remedies for an alleged violation of his rights by an agency of the federal government when the only available judicial forum is the federal court system, it would seem inconsistent not to require such exhaustion when the deprivation is under color of state law." *McCray, supra*, at pp. 1200-1201 (App 15a-19a).

Chief Judge Northrop further noted that employment discrimination cases under Title VII of the Civil Rights Act and the Age Discrimination Act require exhaustion

of administrative remedies and stated that although Congress specifically provided for exhaustion in those cases, the rationale under § 1983 was no less compelling. Further, Chief Judge Northrop stated that while the codification of 28 U.S.C. § 2254 in 1948 required exhaustion in habeas corpus cases this Court had previously required exhaustion by judicial decision. *Ex parte Royall*, 177 U.S. 254 (1886) and *Ex parte Hawk*, 321 U.S. 114 (1944). *McCray, supra*, at p. 1201 (App. 17a).[28]

III.

SOUND AND OVERRIDING POLICY REASONS REQUIRE EXHAUSTION OF MARYLAND'S EFFECTIVE AND ADEQUATE STATE ADMINISTRATIVE REMEDIES PURSUANT TO § 1983 UNDER THE CIRCUMSTANCES OF THIS CASE.

A reevaluation should be undertaken of this Court's pronouncements regarding non-exhaustion in § 1983 prisoner petitions as changed circumstances require changed approaches. The requirement of exhaustion rule has been liberalized in recent years, apparently due to a feeling that the states would not adequately protect those rights guaranteed to its citizens by federal constitutional and statutory provisions. Justice Brennan, in a footnote in his dissenting opinion in *Gibson, supra*, quoted from the remarks of Representative Coburn, Cong. Globe, 42d

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[28] In *Cravatt, et al. v. Thomas, et al.*, 399 F. Supp. 956 (W.D. Wisc. 1975), that court was faced with prisoner petitions pursuant to 28 U.S.C. 2255 filed by federal prisoners alleging certain claims in the nature of deprivations occurring in the federal prison similar to those deprivations alleged under Section 1983 by state prisoners. The Court in that case held that while exhaustion may be required as to the conditions of confinement, he found the grievance system employed by the Federal Bureau of Prisons in these cases to be defective and did not require exhaustion on certain of the issues.

Cong. 1st Sess. 460 (1871), to the effect that the federal courts would be the forum of choice to enforce § 1983 because they were ". . . above mere local influence; . . . their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood." *Gibson, supra,* at p. 514. See also *Pfeifer, supra,* at p. 579. Petitioners herein submit that this philosophy, which has been increasingly prevalent during the last decade, overlooks reality. *McCormack* notes that the authorities are replete with statements that the states should be the primary guarantors of constitutional rights and that some states are doing so but only as a matter of state law. *See McCormack, supra,* at p. 532; *H. Hart and H. Wechsler, the Federal Courts and the Federal System,* 330, 359 (2d Ed. 1973); *Wilkes, The New Federalism in Criminal Procedure—State Court Evasion of the Burger Court,* 62 Ky. L. J. 421 (1974). In *Wright v. Maryland Penitentiary,* 429 F.2d 1101 (4th Cir. 1970), the Fourth Circuit stated that Maryland's court decisions clearly show willingness to adjust state law to conform with contemporary constitutional decisions and that Maryland is sensitive to the constitutional right of state prisoners. *Wright, supra,* at pp. 1105-06.

The unique situation created by the Maryland Inmate Grievance Commission represents a responsive state remedy to the problem represented by prisoner § 1983 actions. *See Hayes, supra,* 455 F.2d at p. 800. The necessity for such a reevaluation is even more compelling because of the substantial burden on the courts and because *Monroe,* which supplied the impetus to § 1983 actions, is of relatively recent vintage (See the comments in *Preiser, supra,* at pp. 491-93.)

The Fourth Circuit recognized that as each of the cases presented the same question of exceptional importance, they were consolidated and heard en banc. *McCray, supra,* 516 F.2d at pp. 359-60 (App. 74a). While acknowledging that the District Court in *Washington v. Boslow, supra,* had found the Inmate Grievance Commission Act a fair and adequate remedy, notwithstanding the inability of the Commission to award money damages, the Fourth Circuit held that, under the law, it could not require exhaustion.

> "We keenly appreciate the force of the factors identified by the district court in *McCray* and *Washington* as supporting a policy determination that exhaustion of available administrative remedies should be required of prisoners of correctional institutions in Maryland as a prerequisite to a suit under § 1983. We recognize the burden which the increasing flood of prisoner complaint litigation places upon the already over-taxed district courts as well as ourselves. Nevertheless, we are constrained to conclude that the holding that exhaustion is required may be reached only by either legislation conditioning resort to 42 U.S.C. § 1983 upon the exhaustion of available administrative remedies, or by the Supreme Court's re-examination and modification of its controlling adjudications on the subject. Congress has not enacted such legislation. The Supreme Court has not yet begun a re-examination of its previous holdings and we have no basis on which to predict that it will, or, if so, with what result. We think that we have no alternative but to hold that exhaustion may not be required." *McCray, supra,* 516 F.2d at pp. 360-61 (App. 75a-76a).

The Fourth Circuit further stated that ". . . it is inappropriate to consider the policy considerations which might dictate a different course of decision. They must be addressed to the Supreme Court, which alone can overrule its prior decisions, or to the Congress, which has

authority to amend the statute. Our duty is clear: We must follow the Supreme Court, not attempt to lead it. We must hold that exhaustion is not required." *McCray, supra,* 516 F.2d at p. 365 (App. 83a). Circuit Judge Field, in his separate opinion, in which Judge Russell joined and in which Judge Widener concurred, felt that he too had no alternative but to hold that exhaustion could not be required in a civil rights action. 415 F.2d at p. 372 (App. 97a-98a). Judge Widener, in his separate opinion, in which Judge Russell joined, while concurring in the result of the majority solely because of Part II of *Wilwording, supra,* stated that:

> "There is assuredly no policy reason for the courts not to apply the customary and general law of requiring exhaustion of administrative remedies merely because a case is brought under 42 U.S.C. § 1983 . . . . Since no policy reason exists against exhaustion in protecting the liberty interest as shown by the decisions of the Supreme Court, I can find no policy interest which exists against an exhaustion requirement respecting conditions of confinement. If exhaustion is required to test the legality of the fact of confinement, what policy should require non-exhaustion when testing the conditions of confinement?
>
> "It follows that I would affirm other than on account of that part of Part II of *Wilwording* which has not been modified." 516 F.2d at p. 377 (App. 107a).

The doctrine of non-exhaustion in a § 1983 action is a judicially created requirement which, if circumstances change, should also be adaptable. The District Court noted:

> "There is need to reconsider the applicability of the exhaustion rule with respect to § 1983 actions when there is an available and adequate state administrative remedy. This is evident when one reads the eight

separate opinions issued by the *en banc* panel of the second circuit in the *Rodriguez* case which reflect a vast disagreement in interpreting the line of cases from *Monroe* to *Wilwording*. In addition to resolving a conflict in interpretation, a reconsideration is necessary to eliminate the contradiction created by the Supreme Court in its analysis of the exhaustion rule in the context of habeas corpus in *Preiser v. Rodriguez, supra*. In that case, the court justified the application of the exhaustion rule in habeas corpus by invoking the concept of federal-state comity, while ignoring that it should be no less a consideration in prisoner § 1983 actions. To resolve these problems one must examine the '[v]arying views as to the breadth of the *Wilwording* holding, the strength of the prior precedents, the proper character of the federal balance, and the potential impact upon judicial administration.' It is therefore imperative that this court consider the validity of these factors and determine under what circumstances, if any, a requirement of exhaustion under § 1983 would be permissible." *McCray, supra,* at p. 1199 (App. 13a-15a) (Footnotes omitted.)

It is abundantly clear that the principal reason behind the decision in *Monroe, supra,* was the nature of the factual situation in that case. "Few reported cases have presented all of the manifold aggravating circumstances which petitioners here allege. . . ." *Monroe, supra,* at p. 210, dissenting opinion of Justice Frankfurter. Further, Justice Frankfurter stated:

> "While we may well decline to re-examine recent cases which derive from the judicial process exercised under its adequate safeguards — documenting briefs and adequate argument on both sides as foundation for due deliberation — the relevant demands of *stare decisis* do not preclude considering, for the first time thoroughly and in the light of the best available evidence of congressional purpose, *a statutory interpretation which started as an unexa-*

mined assumption on the basis of inapplicable citations and has the claim of a dogma solely through reiteration. Particularly is this so when the interpretation, only recently made, was at its inception a silent reversal of the judicial history of the Civil Rights Act for three quarters of a century. . . .

"*But the Court had not always declined to re-examine cases whose outcome Congress might have changed. . . .*

"And with regard to the Civil Rights Act there are reasons of particular urgency which authorized the Court — indeed, which make it the Court's responsibility — to re-appraise in the hitherto skimpily considered context of R.S. § 1979 [now 42 U.S.C. 1983] what was decided in *Classis, Screws and Williams.* This is not an area of commercial law in which, presumably, individuals may have arranged their affairs in reliance on the expected stability of decision. . . . Nor is it merely a mine-run statutory question involving a narrow compass of individual rights and duties. The issue in the present case concerns directly a basic problem of American federalism: the relation of the Nation to the States and the critically important sphere of municipal law administration. . . . 'We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. *But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable. . . .*'" *Monroe, supra,* at pp. 220-222. [Emphasis supplied.]

The District Court recognized the implication of Justice Frankfurter's remarks in *Monroe* that it appeared ineffectual to protect "human liberties by torturing an 1871 statute [42 U.S.C. § 1983] to meet the problems of 1960." *Monroe, supra* at p. 244.

The raison d'etre of § 1983 was to provide a remedy where state law was unfair, inadequate, or where state officials failed to enforce their own laws.

> "The impetus for the enactment of the Ku Klux Act was President Grant's message to Congress asserting that a condition then existed in some States which rendered life and property insecure and which was beyond the power of state authorities to control. . . . Throughout the debates on the bill the note was repeated: there was a need for federal action to supplant state administration which was failing to provide effective protection for private rights. . . . Constitutional authority for such federal action was sought in a logic that 'States' were ordered by the Fourteenth Amendment not to 'deny' equal protection of the law; that a 'state' in effect denied such protections not only when its legislation was on its face unequal, but whenever its judicial or executive authorities by a consistent course of practice, 'permanently and as a rule' refused to enforce its laws for the protection of some class of persons. . . . Wrongs susceptible of adequate redress before the state courts evidently did not concern Congress, and Congress in 1871 did not attempt to reach those wrongs." *Monroe, supra* at p. 230, Fn. 46.

A. The Abuse Of 42 U.S.C. § 1983 Establishes The Need For Exhaustion Of Maryland's Remedy

Although much may be made from the argument that even without an exhaustion requirement, prison inmates will still voluntarily avail themselves of the administrative procedures, it is certainly a naive view of the realities of prison life. *See Wolff v. McDonald,* 418 U.S. 539, 94 S. Ct. 2963 (1974). Without an exhaustion requirement, however, state prisoners undoubtedly will continue to file more and more § 1983 actions for the

tangential benefits they provide.[29] Chief Judge Northrop has further commented:

> "A potential abuse of the right to bring action in federal court under § 1983 has thus been realized, with two adverse results. First, the case load of all the judges has increased tremendously, causing a rising backlog of cases. Secondly, and more importantly, the length of time that elapses from the date a prisoner files a meritorious claim asserting an infrigement of his constitutionally protected rights to the date of disposition, has become so great that often neither equitable nor legal relief are effective in protecting his rights. This latter consequence is due in part to the ever-increasing case load of the courts, and to some extent is a normal reaction to prisoners who have 'cried wolf' many times too often. These factors cause the great concern, and a brief analysis of the magitude of the problem is warranted." *McCray, supra*, at p. 1195 (App. 5a-6a).

This Court has also indicated that § 1983 actions are subject to abuse and indicated the need to reevaluate the non-exhaustion policy and the necessity for alterna-

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[29] Prisoner complaints to state courts regarding conditions of confinement declined approximately 66% after the Commission began operation in 1971. During fiscal 1972, 78 civil rights complaints were filed in the United States District Court for the District of Maryland. These filings rose 41% to 110 cases in fiscal 1973 prior to the decision of the District Court in October, 1973 in *McCray, supra*. For fiscal 1974, subsequent to *McCray, supra*, civil rights filings fell 26% while the population of the correctional facilities rose 11.5%. *Ombudsman/Grievance Mechanism Profiles — No. 3, supra*, at pp. 10-11. The Fourth Circuit reversed the District Court on April 10, 1975. *McCray, supra*, 516 F.2d at p. 357. During the period of May through October, 1974, 84 civil rights cases were filed in the District of Maryland. This number rose to 103 cases for the same period, that is, May through October, 1975.

tives. In *Procunier v. Martinez*, ___ U.S. ___, 94 S. Ct. 1800 (1974), Justice Powell stated:

> "They [the Federal Courts] are also ill-suited to act as the front-line agencies for the consideration and resolution of the infinite variety of prisoner complaints. Moreover, the capacity of our criminal justice system to deal fairly and fully with legitimate claims will be impaired by a burgeoning increase of frivolous prisoner complaints. As one means of alleviating this problem, THE CHIEF JUSTICE has suggested that federal and state authorities explore the possibility of instituting internal administrative procedures for disposition of inmate grievances. 59 A.B.A.J. 1125, 1128 (1973). At the Third Circuit Judicial Conference meeting of October 15, 1973, at which the problem was addressed, suggestions also included (i) abstention where appropriate to avoid needless consideration of federal constitutional issues; and (ii) the use of federal magistrates who could be sent into penal institutions to conduct hearings and make findings of fact. We emphasize that we express no view as to the merit or validity of any particular proposal, but we do think it appropriate to indicate the necessity of prompt and thoughful consideration by responsible federal and state authorities of this worsening situation." Procunier, *supra*, ___ U.S. ___, 94 S. Ct. at p. 1807, Fn. 9.

B. BENEFITS TO BE GAINED FROM EXHAUSTION

As Sullivan notes, the requirement for exhaustion was the result of two fundamental principles: "(1) that questions should be decided by those most competent to do so, and (2) that questions should be decided in an orderly way." Sullivan *supra* at p. 538 Fn. 9. In *Parisi v. Davidson*, 405 U.S. 34, 37 (1972), this Court noted that "[the] basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence — to make a factual

record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." Pfeifer posits that requiring exhaustion of adequate administrative remedies is necessary: (1) to avoid friction when state remedies are by-passed, which reflects the federal court's recognition that the state has an interest in a comprehensive scheme of regulation and in not having that scheme by-passed; (2) to avoid strained relations with other agencies of government; (3) to promote efficiency as cases may be resolved during the administrative process; to allow an individual to pursue a more flexible and less time-consuming and expensive remedy and to provide a record and factual background; (4) to allow the administrative agency to exercise its expertise which might be lacking in the court; (5) that an agency will decide, thus creating an incentive to State administrative agencies which would be absent if their procedures were easily by-passed; and (6) to assure the courts of finality in the cases which reach them for decision. Pfeifer, *supra* at pp. 566-68. Chief Judge Northrop found that the Maryland Inmate Grievance Commission was staffed by persons knowledgeable in the field, provided an effective and adequate remedy, and clearly served all of the traditional requirements of exhaustion. *See* generally *McCray, supra*; and *McCray, supra*, 516 F.2d (separate opinion of Judge Widener).

> "However, if there is available a viable administrative remedy, then the spurious claims will be weeded out, and the district courts will be called upon to hear only those cases that are clearly of constitutional dimension. In addition, the federal district courts will have the benefit of a complete record of the administrative proceedings before the Inmate Grievance Commission, and the appeals to the state courts. Finally, when an infringement of a prisoner's rights is found, but equitable relief can be more effectively enforced by the State, this Court will be able to remand a case to the State. Under this procedure a much better record will be available to the court, the constitutional issues presented by the complaint will be definitely articulated, and the Court will not be bound to act as an advocate for the plaintiff to determine what constitutional grievances he might have." *McCray, supra*, at p. 1201 (App. 17a-19a). *See also Mondell, supra*, at pp. 78-79.

C. Alternative Proposed Approaches

1. *Deferral*

In 82 Harv. L. Rev., the Note proposed that in lieu of wide federal jurisdiction without an exhaustion requirement, "there should be a system of jurisdictionally based deferral to all adequate state remedies in cases not meeting any of the standards based on the three *Monroe* purposes and the class deprivation concern." 82 Harv. L. Rev. at p. 1501.[30] "The cases subject to dismissal for federal courts under the deferral approach would be those of individual deprivations when state remedies are adequate in theory and practice and no state law is challenged as denying a federally secured right. This description sounds heavily qualified; but included are categories of minor cases accounting for significant amounts of section 1983 litigation, such as many police torts, prisoners' rights cases, and probation and parole complaints." Id. at p. 1502 (footnotes

[30] The author indicates that exhaustion is based on the court's declining in its equitable discretion jurisdiction which has been properly invoked; deferral, however, would be based on an interpretation of Section 1983 "viewing dismissal as required by lack of jurisdiction. Deferral thus is equally a possibility with respect to actions at law and suits in equity. The exhaustion requirement has also been limited to cases in which the relevant state remedy was administrative; deferral would eliminate the distinction between administrative and judicial state remedies." 82 Harv. L. Rev. at pp. 1498-99.

omitted). The Note concludes that because of the substantial state interests involved, deferral to adequate state remedies should be imposed under § 1983. Id. at pp. 1510-11. *See also* Pfeifer, *supra*, at p. 566, n. 7.[31]

2. *Full Exhaustion*

Judge Ruggero J. Aldisert, in his article, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Case Load*, Law and Social Order, 1973: 557, has advocated full exhaustion of adequate state administrative remedies in all prisoner cases; limited relitigation of certain issues in federal courts and adoption of the Freund Committee's recommendations that an administrative agency process prisoners' complaints.[32] Aldisert, *supra* at pp. 575-77. *See also* McCormick, *supra* at pp. 533-35.

[31] An offshoot of the various proposals for exhaustion of adequate state administrative remedies is where a statute is attacked on its face as denying a right; in that instance, there would be no need for the application of agency expertise with the development of a factual record. *See Pfeifer, supra*, at p. 568, and *Sullivan, supra*, at pp. 539-40. However, even that suggestion has been subject to certain exceptions. In *Quaker Action Group v. Morton*, 460 F.2d 854 (D.C. Cir. 1971), the court stated that "the governing concept as expressed in both judicial doctrine and statute may require even constitutional claims to be determined on the administrative record when the administrative procedure is fair and adequate for presentation of material facts." *Quaker Action Group, supra*, at p. 861. Similarly, Sullivan proposed that only in those instances where a factual record was totally irrelevant and the statute facially unconstitutional or incapable of any appropriate construction would exhaustion be without value. *Sullivan, supra*.

[32] 57 F.R.D. 573, *supra*.

3. *Administrative Procedure Act*

Another suggestion as an alternative to the exhaustion requirement would be based on Section 704 of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* (1970). Sullivan indicates that a modified approach based on Section 704 would "provide immediate protection of fundamental federal rights, guarantee the litigant's choice of a federal forum, and achieve efficient allocation of judicial resources. Using Section 704 as a basic model, the federal courts should require exhaustion of state administrative remedies where: (1) an orderly system of appeals is provided by statute or agency rule; (2) the administrative remedies are adequate; and (3) the system of appeals provides full interim relief by protecting the litigant's rights under Section 1983 until the administrative process has been concluded." Sullivan, *supra* at p. 555. *See* footnote 13, *supra*.

4. *Individual Injury*

In 68 Colum. L. Rev., the authors, discussing exhaustion under § 1983 after examining *Damico, supra*, and the implications from that case, conclude that exhaustion of state administrative remedies should be required only in matters which concern the individual claimant in order to protect the rights of large numbers of individuals who might be deprived of relief if a case involving a substantial question was settled with that individual. 68 Colum. L. Rev. at pp. 1208-09.

D. If The Maryland Inmate Grievance Commission Is To Be Effective, State Prisoners Must Be Required To Exhaust That Remedy Before Bringing An Action Pursuant To §1983.

"[P]rocedures should be tailored to need, not to some abstract standard." Burger, *supra*, 59 A.B.A.J. at p. 1128. While procedures which are constitutionally

deficient or constitutionally impermissible will not save an otherwise meritorious endeavor, Petitioners have amply demonstrated that the Maryland Inmate Grievance Commission is an effective and adequate state remedy which should be exhausted before a state inmate will be permitted to file an action pursuant to 42 U.S.C. § 1983. As Justice Frankfurter stated, this Court "has not always declined to reexamine cases whose outcome Congress might have changed." And experience dictates that with changed circumstances and effective and adequate remedies, one should not "expect to create an effective means of protection for human liberties by torturing an 1871 statute to meet the problems of 1960." *Monroe, supra* at pp. 220-22, 244. "The evils against which the bill [Section 1983] was directed, moreover, substantiate the three main aims listed in *Monroe* without suggesting that a need was felt for a fully supplementary federal remedy." 82 Harv. L. Rev. at p. 1492. The State of Maryland has made a genuine and good-faith effort to protect federal rights in state administrative proceedings. 82 Harv. L. Rev. at p. 1493.

The liberalization of the exhaustion doctrine in § 1983 cases has, according to certain commentators, apparently begun to retreat.

> "Whatever reasons the Supreme Court may have for the startling result are obfuscated through the pretense that the *Damico* result followed from *McNeese* and the pretense that the *McNeese* result followed from *Monroe*. The holdings have been largely in the nature of unreasoned fiats, and the results seem altogether unsatisfactory because they are so clearly contrary to such principles as have heretofore been discernable in exhaustion law." K. Davis, *Administrative Law Treatise*, Sec. 20.01 (1958), at pp. 668-69 (Supp. 1970).

Davis also predicted that the non-exhaustion rule would not endure. K. Davis, *supra*, Sec. 20.09 at p. 699. *See also* Pfeifer, *supra*, at p. 577. Sullivan is also of the opinion that *Preiser, supra*, and certain of the other cases have indicated that the traditional exhaustion doctrine is appropriate in certain instances. Sullivan, *supra* at p. 537. In *Wolff v. McDonnell, supra*, this Court, while not discussing the question of exhaustion in § 1983 cases, did formulate a distinction between due process rights afforded those incarcerated and those in free society. *Wolff, supra*, 418 U.S. ___, 94 S. Ct. at 2977. Judge Widener, in *McCray, supra*, stated:

> "Wolfe[sic] v. McDonnell, 418 U.S. 539 . . . (1974), however, held, rather than recited, that the rights of a state prisoner under § 1983 are not coextensive with those of any other person, and the court stated: 'Of course, as we have indicated, that a prisoner retains rights under the Due Process Clause in no way implies that this right is not subject to restrictions imposed by the nature of the regime to which he has been lawfully committed. . . . (Citations omitted). Prisoner disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. . . . (Citations omitted). In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.' The rule, 418 U.S. at 556 . . . as pointed out in the dissenting opinions, created a separate class for prisoners." *McCray, supra*, 516 F.2d at p. 376 (App. 105a).

In *Huffman v. Pursue*, ___ U.S. ___, 95 S. Ct. 1200 (1975), this Court held that in certain circumstances, an individual would be required to exhaust his state appellate remedies before seeking relief in district court unless he could bring himself within an exception specified in *Younger v. Harris*, 401 U.S. 37 (1971). "The

importance of the ruling [Huffman v. Pursue] is that it shows definitely that the all embracing rule of non-exhaustion in all § 1983 cases is no longer the law, for this, and the holding in *Wolfe* [sic], are direct holdings that, first, prisoners' rights are special cases, and, second, exhaustion may be required in some circumstances although the basis of the suit is under 42 U.S.C. § 1983." *McCray, supra*, 516 F.2d at p. 376 (App. 106a, separate opinion of Judge Widener).

"Although not decided under 42 U.S.C. § 1983, *Schlesinger v. Councilman*, ___ U.S. ___, 95 S. Ct. 1300 . . . (1975), has further eroded the all embracing rule. It held that where a serviceman is charged with crimes by military authorities and could 'show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise.' at ___, 95 S. Ct. at 1313. And the court concluded '. . . we discern nothing that outweighs the strong considerations favoring exhaustion of remedies or that warrants intruding on the integrity of military court processes.' at ___, 95 S. Ct. at 1315. At p. ___, 95 S. Ct. 1300, the court had compared the policy rules of exhaustion in habeas corpus and non-intervention in State criminal proceedings with exhaustion of administrative remedies." *McCray, supra*, 516 F.2d at p. 376 (App. 106a, separate opinion of Judge Widener).

Davis, *supra*, commented, following his discussion of *Preiser, supra*, that the question remained open why there was ". . . no general requirement that adequate internal prison remedies be pursued, if not exhausted." He indicated that access to the district court would still lie but the burden would be the prisoner's to show why he could not obtain extra-judicial satisfaction. "Presumably it would also be in the state's interest to adopt

procedures that accorded fair treatment to prisoners, for in that manner the federal judge would less easily plunder its employees' purses and discretionary authority. If a distinction from other kinds of civil rights cases is necessary to justify this proposal, then surely it lies in the state's special need for physical prison security." Davis, *supra* at p. 1384. Davis also cites the proposals of Judge Friendly which recommended that state prisoner suits be divided into two classes: (1) allegations of constitutional error in the original criminal conviction and all other actions. The other actions would require exhaustion of state administrative remedies. *See* Davis, *supra* at p. 1384, n. 107; and H. Friendly, *Federal Jursidiction: A General View*, 105-07 (1973).

Perhaps, more important, is the fact that the tremendous increase in the number of civil rights complaints filed in federal court not only had "a detrimental impact upon the judicial system and its administration," but that adjudication of legitimate complaints of prisoners whose constitutional rights were being violated was being delayed. *McCray, supra* at pp. 1194, 1201 (App. 3a-5a, 17a-19a).[33]

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[33] Chief Judge Northrop in his opinion in *McCray, supra*, quoted extensively from the report in 57 F.R.D. 573, *supra*, which referred to the magnitude of the problem of prisoner complaints and the necessity of finding a reasonable alternative. A similar discussion of the need for an alternative remedy to § 1983 actions is found in *Prison Ombudsmen Provide a Safety Valve*, 56 Judicature 314 (March 1973), also discussed by Chief Judge Northrop. The Inmate Grievance Commission ". . . combines the best of both suggestions, that is, initial investigation by a non-judicial institution charged with the responsibility of investigating and assessing prisoner complaints, and provision for subsequent review by the courts." *McCray, supra*, at pp. 1205-1207 (App. 23a-30a).

Subsequently, in *Washington v. Boslow, supra*, the District Court cited the observations of Judge Aldisert:

> "There is also a point of view which first came to me over a cup of coffee from an experienced and sensitive

"What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his

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federal trial judge, whose record proves he has been concerned with protecting the rights of the state prisoners. In discussing this subject, he admitted an abiding concern that, in his efforts to improve the lot of many prisoners, he was actually producing the opposite effect. The judge commented that he was afraid he had been playing warden, but was not sure that he had succeeded well. He remarked that while he thought he had given the prisoners their constitutional rights, he had also crippled prison discipline. The guards were now scared; what is more, they were demoralized. He observed that guards are now taunted, abused and spat upon, that competent personnel are leaving. As a consequence, many of the prisoners are at the complete mercy of other prisoners— toughs and bullies who are having a field day. In short, the judge was very much afraid that the federal judiciary had made a serious mistake. The courts had given birth to something and now could not put the baby back.

Meanwhile prisoners' petitions continue to inundate the federal courts, pathetic, handwritten grievances; some very real; some rather illusory; some with genuine constitutional issues; some merely stating disagreements with administrative decisions. This litigious flood consumes many judicial manhours and challenges the abilities of federal courts to cope with their own calendars. Mr. Justice Powell's recent statement concerning state habeas corpus in the federal system is equally applicable to prisoners' civil rights claims: 'The current flood of petitions . . . already threatens — because of sheer volume — to submerge meritorious claims and even to produce a judicial insensitivity to . . . petitioners.'

. . .

The Freund Committee met this phenomenon with refreshing candor:

> The number of these petitions found to have merit is very small, both proportionately and absolutely. But it is of the greatest importance to society as well as to the individual that each meritorious petition be identified and dealt with. And yet it seems a misallocation of resources to impose the

neighbor, or with his banker becomes, for the prisoner, a dispute with the State. Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the states have an important interest in not being by passed in the correction of these problems." *Preiser, supra,* at pp. 491-92. Disputes regarding living conditions, employment opportunities within the institution, property, assaultive fellow inmates, or medical problems do not relate to the validity of the fact or length of confinement but are claims cognizable under § 1983. The State has the right, when it provides an effective and adequate administrative remedy as does Maryland, to require use of that remedy to "clean its own house." "Exhaustion of adequate administrative remedies in section 1983 cases allows the state agency to apply its expertise, develop a factual record, and cure its own errors without prejudicing the litigant's right to a federal forum." Sullivan, *supra* at p. 552.[34]

> burden of sifting through the mass of these petitions on federal judges, let alone Supreme Court justices.
>
> While the deluge of prisoner petitions descends upon the federal courts, nothing is directed to the state courts, to the state judges who ordered incarceration in the first instance. And while state courts clearly have inherent power to require the establishment of administrative procedures to process prisoner complaints and to deal with legal problems generated by prison life, under recent case law it is the federal judge who must listen to state prisoner complaints. Even acknowledging the basic responsibilities of an Article III judge to be hospitable to constitutional claims, the federal judiciary's receptiveness to prisoners' civil rights claims no longer makes sense in view of the burgeoning federal case load." *Washington, supra,* at pp. 1303-04 (App. 66a-68a).

[34] "The Commission seems to have gained acceptance by correctional administrators throughout the state. It has recognized and reinforced areas of proper correctional

While it was believed that there was scant legislative intent for an exhaustion requirement, Representative Hoar stated:

> "To authorize the interference of Congress there must be, not merely those inperfections and failures in the administration of law which are attendant upon all civil governments alike, but there must be a clear case of denial of government. We cannot interfere to deal with the incidental evils which attend upon Republican government; but we should interfere . . . wherever these evils have attained to such a degree as amounts to the destruction, to the overthrow, to the denial to large classes of the people of the blessings of Republican government altogether." Congressional Globe, 42nd Congress, First Session (1871), at p. 334.

If it was truly the legislative intent to provide a federal remedy where a state remedy was not in fact adequate, it also follows that legislative intent requires that adequate state administrative remedies be exhausted. "The third element of congressional purpose requires that the federal court inquire not only into the state remedy's adequacy as it appears from statute and regulation, but also its adequacy in practice. Rather

practice and has identified numerous problem areas in the operation of the state's correctional system, assisting in their resolution. It has also become a 'safety valve,' in the eyes of some correctional personnel, for relieving tensions within institutions.

"The Inmate Grievance Commission was originally viewed by some as the means through which major change could be stimulated within Maryland's Correctional System. While this goal does not yet appear to have been achieved, the Commission has (i) validated inmate grievances in a significant number of cases, (ii) had its recommendations accepted by correctional authorities in the great majority of cases, (iii) expressed public and official concern for the care and treatment of those incarcerated and (iv) emphasized the need for correctional services to be administered fairly, in a humane manner, and in harmony with statutory and

than precluding exhaustion, this element sup[p]orts the exhaustion requirement, since there is no reason to

constitutional guarantees." *Ombudsman/Grievance Mechanism Profile — No. 3, supra,* at p. 11.

A full tabulation of the first three years of the Commission's operation shows, regarding all cases filed, the following statistics:

"APPENDIX B

MARYLAND INMATE GRIEVANCE COMMISSION DATA

	7/1/71-6/30/72	7/1/72-6/30/73	7/1/73-6/30/74	Three Years 7/1/71-6/30/74
Complaints Received by IGC	340	609	731	1680
Average Number of Complaints Per Month	28.3	50.8	60.9	46.7
Number of Inmates (Year-End Population)	5255	5197	5807	
Ratio—Inmates per IGC Complaint	15.5	8.5	7.9	10.3
Inmate Civil Right Cases Filed in Maryland Federal District Court	78	110	81	
Inmate Civil Rights Cases Filed, All Districts	3348	4174	5236	
Maryland Civil Rights Cases as Percentage of Total Filings	2.3%	2.6%	1.6%	
IGC Complaints Administratively Dismissed				936
Cases Heard				707
Cases Open (Incomplete Preliminary Investigation)				73
IGC Order Issued				638
Complaint Meritorious				191
Complaint Without Merit				417
Moot				30"

Ombudsman/Grievance Mechanism Profile — No. 3, supra, at p. 16.

See also 56 Judicature 314, *supra.*

distinguish between adequate and inadequate remedies if the exhaustion principle is to be abrogated in all section 1983 cases." Sullivan, *supra* at pp. 553-54.

This Court has never been presented with an effective and adequate state administrative remedy since its decision in *Monroe, supra.* Under these circumstances, it is clear that the vehicle is present by which this Court may require that a state inmate pursue those remedies before filing a § 1983 action.

> "As previously pointed out, this Court does not think that anything in the prior trend of decisions prohibits this action, although, in all candor, the cases would not seem to encourage it. *But those were different cases dealing with different facts, with administrative remedies almost neolithic compared to the Maryland Inmate Grievance Procedure." McCray, supra* at p. 1207 (App. 30a). [Emphasis supplied][35]

[35] There are several other recent reported decisions which discuss exhaustion of adequate state administrative remedies which are pertinent to this case. In *Hyde v. Fitzberger,* 365 F. Supp. 1021 (D. Md. 1973), Senior Judge R. Dorsey Watkins concurred with the finding of Chief Judge Northrop in *McCray v. Burrell, supra,* and required exhaustion of adequate state administrative remedies. In *Jones v. Superintendent,* 370 F. Supp. 488 (W.D. Va. 1974), that court quoted with approval the decision in *McCray v. Burrell, supra,* but indicated that it was applicable only in Maryland, which had established adequate state administrative remedies. In *Borror v. White,* 377 F. Supp. 181, 184-85 (D. Va. 1974), that court quoted extensively from *McCray, supra,* and found itself in complete agreement with Judge Northrop's observations regarding the detrimental impact of § 1983 cases on the administration of justice. The court then indicated that it was in agreement with Judge Northrop's finding that the Maryland Inmate Grievance Commission was an adequate state administrative remedy. *See also Farrington v. State of North Carolina,* 391 F. Supp. 714, 719 (D. N.C. 1975); *Hardwick v. Ault,* 517 F.2d 295, 297 (5th Cir. 1975); *Clark v. Zimmerman,* 394 F. Supp. 1166, 1171 (D. Pa. 1975); *Fuentes v. Roher,* 519 F.2d 379, 386 (2d Cir. 1975); *Plano v. Baker,* 504 F.2d 595, 597 (2d Cir. 1974); and *Cordova v. Reed,* ___ F.2d ___, No. 1063, September Term, 1974 (2d Cir., Aug. 7, 1975), ("In the absence of a definitive holding, however, this Circuit has not abandoned the rule of *Eisen v. Eastman,* 421 F.2d 560 (2d Cir. 1969), *cert. denied,* 400 U.S. 841 (1970), regarding exhaustion of administrative remedies in certain situations."), *Cordova, supra,* Slip Opinion at p. 5467.

A bona fide effort by the State of Maryland, coupled with an effective and adequate remedy, clearly points to the conclusion that the State should be allowed a first opportunity to resolve prisoner grievances. The trend of the 1960's, when the reported cases suggested an apparent indifference of the states to individual rights, has disappeared. Whatever problems have existed have generally been eliminated by the states, due, in part, to the receptiveness of the Federal Courts to prisoner claims. Maryland is one such State and now asks only to be given the opportunity to utilize its tools to finish the job.[36]

IV.

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED WHEN IT REVERSED THE JUDGMENTS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND IN McCRAY v. BURRELL, NO. 74-1042, AND McCRAY v. SMITH, NO. 74-1043, BASED ON A FINDING THAT REPSONDENT McCRAY'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED UNDER THE CIRCUMSTANCES OF THOSE CASES AND REMANDED THE SAME FOR DETERMINATIONS ON THE MERITS.

The United States Court of Appeals for the Fourth Circuit clearly erred in *McCray v. Burrell,* No. 74-1042,

[36] Broadcast speech of Sir Winston Churchill on February 9, 1941, in response to a message delivered to him from President Franklin D. Roosevelt by Wendell Wilkie.

> "We shall not fail or falter, we shall not weaken or tire. Give us the tools and we will finish the job."

and *McCray v. Smith*, No. 74-1043, when it held that Respondent's constitutional rights had been violated by confinement in isolated cells for limited periods of time. The Fourth Circuit held, in *McCray v. Smith, supra*, that while the conditions of confinement *per se* did not amount to a denial of his constitutional rights, the failure to notify a psychiatrist/psychologist pursuant to the directive of the Maryland Penitentiary may have amounted to a constitutional denial. *See McCray, supra*, 516 F.2d at pp. 367-69 (App. 89a-91a). In *McCray v. Burrell, supra*, the Fourth Circuit found two constitutional violations: (1) the conditions of confinement in the mental observation (M.O.) cell and (2) the failure to comply with the administrative directive to contact a psychiatrist/psychologist. *See McCray, supra*, 516 F.2d at pp. 368-69 (App. 90a-92a). The Fourth Circuit acknowledged the extensive findings of fact made by the District Court which resolved questions of credibility and accepted those findings. It also accepted the District Court's findings that Respondent's confinement in the isolated areas was not intended as punishment but was for mental observation and as a precaution against real fears that Respondent would do harm to himself and/or incite others. *McCray, supra*, 516 F.2d at pp. 365, 367 (App. 84a, 87a-88a).

On appeal from the finding of a trial court in a non-jury action, the findings of fact of the trial court will not be set aside unless clearly erroneous and due regard will be given to the opportunity of the trial court to judge the credibility of the witnesses. Rule 52, Federal Rules of Civil Procedure; *B's Co., Inc. v. B. P. Barber & Assoc., Inc.*, 391 F.2d 130, 132 (4th Cir. 1968); and *Agee v. Hickman*, 490 F.2d 210 (8th Cir. 1974). Further, the decision and judgment of the trial court will not be disturbed on appeal if it is supported by substantial

evidence, and if the same is not erroneous as a matter of law. *Hellman v. Colonial Insurance Co.*, 475 F.2d 1061 (9th Cir. 1973); *B's Co., supra* at p. 138. Judge Widener, in his separate opinion, stated that while the majority accepted the findings of the District Court, it disregarded, he believed improperly, the inferences made by the District Court which he felt the Court was unable to do. See the separate opinion of Judge Widener, 516 F.2d at p. 375 (App. 103a), and the cases cited therein.

While not directly stating that the District Court's application of the facts to the law was clearly erroneous, the Fourth Circuit apparently rested its decision on its finding that it did not approve of isolated confinement rather than on a finding that the Eighth Amendment prohibits such isolated confinement. Judge Field, in his separate opinion, in which Judge Russell joined and with which Judge Widener agreed, also construed the majority opinion in this manner.

In *McCray v. Smith*, Respondent, on November 20, 1971 was removed from his regular cell due to his complaints about unsanitary conditions, and Petitioner Smith, who had never met McCray prior to this time, ordered him showered and placed in another cell. Subsequently, Respondent began a vocal disturbance; Petitioner Smith determined that he was to be removed from his cell and placed in isolated confinement (I.C.) to avoid the possibility of starting a disturbance in his housing area. *McCray, supra*, at p. 1211 (App. 37a-38a) and *McCray, supra*, 415 F.2d at 516 F.2d at p. 365 (App. 84a-85a). When Respondent was being placed in the I.C. area, he again caused a disturbance and was placed in I.C. cell Number 5. *McCray, supra*, 415 F.2d at pp. 365-366 (App. 85a). In accordance with the administrative directive, when Petitioner Smith checked on Respond-

ent the next morning and found that he had spread human feces throughout the cell, he determined that Respondent was not in a position to be returned to his regular cell and contacted Mr. Musk, the institutional psychologist (T. 225). Under these circumstances, the institutional psychologist was contacted within twenty-four hours in accordance with the administrative directive (T. 242). On November 22, 1971, Respondent, acting normally, was returned to his regular cell. *McCray, supra,* 516 F.2d at p. 366 (App. 86a).

In *McCray v. Burrell,* on January 1, 1972, a fire broke out in Respondent's cell and, after the same was put out, he received medical attention after being abusive to the nurse. Mrs. Weber, the nurse at the Maryland Penitentiary hospital, advised the institutional physician that Respondent was being placed in the mental observation (M.O.) unit, and the institutional physician instructed Mrs. Weber to contact Dr. Stewart (T. 502). Mr. Musk, the institutional psychologist, acknowledged that he was familiar with the incident and the fire in January 1972, and that he saw Respondent in the isolated confinement area (T. 383-84). Respondent was placed in the mental observation cell at about 9:45 a.m. on January 1, 1972, and released about 8:00 a.m. on January 3, 1972. *McCray, supra,* 516 F.2d at pp. 366-67 (87a).

The District Court held that the confinement of Respondent "in both cases for forty-eight hours was not an unreasonable period when one considers the surrounding circumstances in each case" and that "the defendant's actions were not excessive exercises of authority beyond the limits of civilized standards of decency" and were not "intended as punishment for the plaintiff's conduct . . . they were employed as precautionary measures. The removals . . . to isolated cells

were not pointless impositions of suffering . . ." and there was not "a less severe alternative that would have achieved the purposes for which the confinement was imposed." *McCray, supra* at pp. 1215-16 (App. 44a-48a). *See also McCray, supra,* 516 F.2d at pp. 366-67 (87a-88a).

The two primary tests for violation of the Eighth Amendment are: (1) were the conditions of confinement such as to shock the conscience of the court and amount to cruel and unusual punishment and (2) is the punishment rationally related to a permissible end or is it arbitrary, unreasonable, or unnecessary *i.e.,* is there a less severe alternative to achieve "the purposes for which the confinement was imposed." *McCray, supra,* 367 F. Supp. at p. 1216 (App. 45a-47a); *McCray, supra,* 516 F.2d at pp. 367-68 (App. 89a). *See also Landman v. Royster,* 354 F. Supp. 1302, 1318 (E.D. Va. 1973); *Howard v. Smyth,* 365 F.2d 428, 431 (4th Cir. 1966); *Almond v. Kent,* 459 F.2d 200, 204 (4th Cir. 1972); and *Weems v. United States,* 217 U.S. 349, 370 (1910).

The Fourth Circuit found possible constitutional deprivations in the failure of Petitioners Burrell and Smith to follow the administrative directive of the Maryland Penitentiary which would require the notification of a psychologist/psychiatrist when an individual displayed irrational behavior. Judge Field noted in his separate opinion that the majority bolstered its opinion by seizing . . . "upon an institutional directive which stated that 'an inmate who is displaying mentally disturbed behavior may be placed in an isolation cell for the inmate's own safety, or that of the inmate population, until the psychologist/psychiatrist is notified' . . . this somewhat novel constitutional pronouncement utterly ignores the finding of the district judge that the *principal* reason for McCray's

isolation was to insulate the other inmates of the South Wing from the potentially dangerous and disruptive consequences of McCray's outrageous and flagrant misconduct, including what the district judge found was his attempt 'to burn his cell and possibly the entire South Wing.' . . . The fact is, however, he required no such medical attention, and I am unaware of any constitutional principle which requires or justifies the incorporation of such an institutional directive into the Bill of Rights." *McCray, supra*, 516 F.2d at pp. 373-374 (App. 100a-102a). *See also Fitzgerald v. Estelle*, 505 F.2d 1334, 1343 (5th Cir. 1975); and *Rodriguez v. McGinnis*, 451 F.2d 730, 732 (2d Cir. 1971). It is clear in both cases that the isolation of Respondent was pursuant to the policy of the Maryland Division of Correction, and there was testimony in both instances that Petitioners Smith and Burrell notified the psychologist within twenty-four hours and that Mrs. Weber notified the institutional physician so that the necessary arrangements could be made (T. 242, 502). The determination by the Fourth Circuit that there were violations of the administrative directive was error.

In *McCray v. Smith*, while the Fourth Circuit did not find the conditions of confinement in the isolated confinement (I.C.) section of the Maryland Penitentiary to be *per se* cruel and unusual punishment, it did find that confinement to the mental observation (M.O.) unit was per se cruel and unusual punishment in *McCray v. Burrell. McCray, supra*, 516 F.2d at pp. 368-369 (App. 90a-91a). Judge Field noted that in *McCray v. Smith*, due to Respondent's behavior, the decision to place Respondent in the I.C. cell without clothing and a mattress was not unreasonable under the circumstances, as Respondent had indicated that he would do bodily harm to himself. The following morning, after

Smith discovered Respondent's condition, he had him showered and returned to the cell after it was cleaned. *McCray, supra*, 516 F.2d at pp. 372-73 (App. 98a-99a). Judge Field further noted that the same mental aberrations existed in the situation with Petitioner Burrell, and that Respondent was placed in the M.O. cell without clothing in order to protect himself from self-injury. *McCray, supra*, 516 F.2d at pp. 372-73 (App. 99a). In *Landman v. Peyton*, 370 F.2d 135 (4th Cir. 1966), which involved the conditions of solitary confinement at the Virginia State Penitentiary, the evidence disclosed that the prisoners in such confinement subsisted on a diet of bread and water for two days, were deprived of all items for personal hygiene, and that the authorities resorted to the use of tear gas twelve to fifteen times in the course of a year. "Judge Sobeloff . . . concluded that since the case came to us on conflicting testimony, we were not prepared to say that the findings of the district judge were clearly erroneous." McCray, *supra*, 516 F.2d at p. 372 (App. 98a). Judge Field noted that the findings and conclusions of the District Court in this case should be accorded similar respect.

The District Court found that the physical aspects of the cells in both the isolated confinement and mental observation areas were primitive but substantially the same. "However, it is significant that the plaintiff candidly admitted on several occasions he had requested to be placed in the I.C. area because it was more conducive to preparation of legal papers. While it is true that he was fully clothed on these latter visits to I.C., it does indicate that the conditions of the cells were not intolerable." McCray, *supra*, at p. 1216 (App. 46a-47a). After finding that Respondent was placed in the isolated areas on both occasions to avoid provoking

situations which could start a riot, the District Court found that none of these events was arbitrary or capricious punishment, with which the Fourth Circuit agreed. *McCray, supra*, 516 F.2d at p. 373 (App. 100a). The District Court then concluded that Petitioners' actions "were not excessive exercises of authority beyond the limits of civilized standards of decency . . . Nor were they intended as punishment for plaintiff's conduct, but, as has been repeatedly stated, they were employed as precautionary measures. The removals of the plaintiff from his cell on the South Wing to isolated cells were not pointless impositions of suffering, nor was there a less severe alternative that would have achieved the purposes for which the confinement was imposed. *Furman v. Georgia*, 408 U.S. 238." *McCray, supra*, at p. 1216 (App. 46a-47a). *See also Landman v. Royster, supra.*

Judge Field further noted that this was not a case dealing with an arbitrary or pervasive pattern of conduct as in *Landman v. Royster, supra; Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971), or with prolonged confinement in strip cells as in *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967); nor was there an attempt at arbitrary punishment as in *Howard v. Smyth*, 365 F.2d 428 (4th Cir. 1966). *See McCray, supra*, 516 F.2d at pp. 374-75 (App. 101a-102a). *See also Wright v. McMann*, 460 F.2d 126 (2d Cir. 1972), a case where the inmate was placed in a strip cell for periods of eleven days and twenty-one days to demean and punish him.

Judge Field concluded that he read the majority opinion to be that "it is tantamount to a declaration that in this circuit the Eighth Amendment proscribes any substantial disciplinary action by prison authorities no matter how extreme and disruptive the misconduct of the inmate may be. In my opinion we would better serve the interests of justice and orderly prison administration by heeding the admonition of Judge Kaufman in *Sostre v. McGinnis*, 442 F.2d 178, 190-191, (2 Cir. 1971):

> 'For a federal court, however, to place a punishment beyond the power of a state to impose on an inmate is a drastic interference with the state's free political and administrative processes. It is not only that we, trained as judges, lack expertise in prison administration. Even a lifetime of study in prison administration and several advanced degrees in the field would not qualify us as a federal court to command state officials to shun a policy that they have decided is suitable because to us the choice may seen unsound or personally repugnant.'" *McCray, supra*, 516 F.2d at pp. 374-75 (App. 102a).

The District Court further found that while the Division of Correction of Maryland was plagued with considerable prisoner unrest, it should be allowed to avoid situations which could ignite a riot, and that such an attempt was the principal factor when Respondent was placed in the isolated areas. *McCray, supra*, at pp. 1213-14 (App. 40a-44a).

Under all the circumstances of this case, the Fourth Circuit clearly erred, as: (1) it made no finding that the District Court was clearly erroneous; (2) its incorporation of the administrative directive of the Division of Correction as a constitutional guarantee was improper under the circumstances of this case, since there was evidence which clearly indicated that the administrative directive was followed; and (3) it made inconsistent findings that while the isolated confinement (I.C.) area of the Maryland Penitentiary was not a constitutional deprivation, confinement to mental observation (M.O.)

was a constitutional deprivation. Especially in light of the finding of the District Court that the two areas were substantially the same, Respondent's confinements in those two areas were not constitutional deprivations.

CONCLUSION

The General Assembly of Maryland in 1971 established for the first time in this country a highly professional state agency with the specific responsibility of adjudicating effectively, promptly, and fairly allegations of improper conditions of confinement lodged by prisoners in state institutions. The experience of the past four years indicates that the Inmate Grievance Commission has fulfilled its promise. The Commission's record and the record in this case establish beyond question that Maryland has an effective and adequate administrative remedy. Overriding reasons of policy and sound judicial administration require a reversal of the opinion and judgment of the United States Court of Appeals for the Fourth Circuit that such a remedy may be by-passed at the whim of a state prisoner. The prior holdings of this Honorable Court are not inconsistent with the relief prayed.

For these reasons, Petitioners urge that the opinion and judgment of the United States Court of Appeals for the Fourth Circuit should be reversed and the opinion and judgment of the United States District Court for the District of Maryland in these cases should be affirmed.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-44

ROBERT BURRELL, *et al.*,

Petitioners,

v.

MILTON McCRAY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-44

ROBERT BURRELL, *et al.*,

Petitioners,

v.

MILTON McCRAY, *et al.*,

Respondents.

ON WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS

QUESTIONS PRESENTED FOR REVIEW

1. Whether a Maryland prisoner who alleges violation of his constitutional rights arising out of his imprisonment may be required to exhaust state administrative remedies before being permitted to proceed in federal court under 42 U.S.C. § 1983.
2. Whether the Eighth and Fourteenth Amendment rights of Respondent McCray were violated by Petitioners Burrell and Smith when they subjected McCray to

isolated confinement under severe and harsh conditions.[1]

STATEMENT OF THE CASES

A. Burrell v. McCray and Smith v. McCray

On January 19, 1972, Milton McCray, a state prisoner at the Maryland Penitentiary in Baltimore, filed a *pro se* complaint in the United States District Court for the District of Maryland under 42 U.S.C. §1983 claiming that his constitutional rights had been violated by a prison guard, Robert Burrell, when he, McCray, was locked in an isolation cell and subjected to inhumane conditions of confinement. On February 9, 1972, McCray filed a supplemental *pro se* pleading.

On March 7, 1972, McCray filed another *pro se* civil rights complaint against Bernard D. Smith, alleging that Smith, a guard at the Penitentiary, had subjected McCray to a deprivation of his constitutional rights by arbitrarily confining McCray in an isolation cell under excessively harsh conditions. The complaint against Smith was unrelated to the complaint McCray had previously filed against Burrell.

Counsel was appointed to represent McCray in both cases on about March 16, 1972, and by agreement of all

[1]The Questions presented by Petitioners (Pet. Br. at 9) are different in substance from the questions already presented in the Petition for Writ of Certiorari, and Question 3 is conclusory in that it assumes the adequacy of the proposed state remedy. The Questions suggested by Respondents, *supra*, conform to the questions on which certiorari was granted and are properly expressed in the terms and circumstances of the case. See, Rule 40, Rules of the Supreme Court.

counsel and the District Court, the cases were consolidated. The defendants below filed, through counsel, on May 1, 1972, a joint motion to dismiss each case, principally on the ground that McCray had failed to exhaust an available state administrative remedy by not petitioning the Maryland Inmate Grievance Commission for relief before filing his complaints in federal court.

On June 11, 1973, the defendants' motion to dismiss was heard before the Honorable Edward S. Northrop. The parties submitted evidence concerning the adequacy of the Inmate Grievance Commission as a state administrative remedy for the purpose of exhaustion, and the Court heard legal argument on the question of whether exhaustion could be required in a §1983 action under the circumstances presented by these cases. At the conclusion of the hearing on the defendants' motion, the Court proceeded, on June 12, 1973, to hear the merits of McCray's claims. Testimony was presented over a three-day period.

On October 16, 1973, the Court issued an opinion and order denying defendants' motion to dismiss and denying McCray's claims for relief. In an order filed November 2, 1973, the Court amended its opinion and original order by granting the defendants' motion to dismiss and denying McCray's claims for relief. Judgments were entered accordingly on November 5, 1973. The opinion of the District Court is reported as *McCray v. Burrell*, 367 F. Supp. 1191 (D. Md. 1973).

McCray appealed to the United States Court of Appeals for the Fourth Circuit which reached the merits of the cases and reversed the judgments of the District Court. *McCray v. Burrell*, 516 F.2d 357 (4th Cir. 1975) (*en banc*). The Court of Appeals held that McCray's Eighth Amendment rights were violated by Burrell and

Smith and remanded the cases for further proceedings to determine if McCray is entitled to damages or if Burrell and Smith may avail themselves of a qualified immunity and good faith defense.

On April 25, 1974, the Court of Appeals had consolidated McCray's appeals with the appeal of Respondent James E.X. Stokes. See, *infra*. Briefs were filed in the McCray and Stokes cases, and they were argued on June 6, 1974. Subsequently, on June 27, 1974, without the Court having issued a decision, the McCray and Stokes cases were consolidated with the case of Respondent Washington, see, *infra*, for *en banc* consideration by the Court of Appeals.

B. *Boslow and Sorongon v. Washington*

On October 16, 1973, John Washington, a Maryland state prisoner at the Patuxent Institution in Jessup, filed a *pro se* complaint in the United States District Court for the District of Maryland under 42 U.S.C. §1983 claiming that he suffered injuries and deprivations of his constitutional rights as a result of the failure of Petitioner Sorongon, a prison doctor, and Petitioner Boslow, the Director of Patuxent Institution, to provide Washington with necessary medical care. Washington sought declaratory relief and an award of compensatory and punitive damages. He demanded a trial by jury.

The defendants below filed a motion to dismiss Washington's complaint on the sole ground that he had failed to exhaust state administrative remedies by presenting his claim to the Maryland Inmate Grievance Commission. The defendants relied exclusively on the previous decision by the Honorable Edward S. Northrop in *McCray v. Burrell*, 367 F. Supp. 1191 (D. Md. 1973).

Counsel was appointed to represent Washington, and on April 4, 1974, a hearing was held before the District Court on the defendants' motion to dismiss. The parties submitted evidence concerning the adequacy of the Inmate Grievance Commission as a state administrative remedy for the purpose of exhaustion (including portions of the record from *McCray v. Burrell, supra*), and the Court heard argument by counsel.

On May 17, 1974, Chief Judge Northrop issued an opinion and order granting the defendants' motion to dismiss. The opinion was subsequently amended on May 22, 1974. Judgment was entered accordingly on May 20, 1974, and Washington made a timely appeal. The opinion of the District Court is reported as *Washington v. Boslow*, 375 F. Supp. 1298 (D. Md. 1974).

Washington appealed to the United States Court of Appeals for the Fourth Circuit which reversed the judgment of the District Court and remanded the case for a determination on the merits.

C. *McClellan v. Stokes*

On December 4, 1973, James E.X. Stokes, a state prisoner at the Maryland Penitentiary in Baltimore, filed a *pro se* civil rights complaint in the United States District Court for the District of Maryland alleging that Petitioner McClellan and other prison officials violated his First and Fourteenth Amendment rights by denying him permission to receive and read two national political newspapers, the "Gay Liberator" and "Akwesasne Notes." On December 17, 1973, Stokes filed a supplemental *pro se* pleading.

The defendants below moved that Stokes' complaint be dismissed for failure to exhaust state administrative

remedies on the authority of *McCray v. Burrell*, 367 F. Supp. 1191 (D. Md. 1973). On April 1, 1974, the District Court granted the defendants' motion and ordered that Stokes' complaint be dismissed without prejudice to institute a further action after having unsuccessfully petitioned the Maryland Inmate Grievance Commission for relief. Judgment was entered accordingly on April 1, 1974.

Stokes appealed to the United States Court of Appeals for the Fourth Circuit which reversed the judgment of the District Court and remanded the case for a determination on the merits. *McCray v. Burrell*, 516 F.2d 357 (4th Cir. 1975).

D. The facts in *Burrell v. McCray*

The district court found that on December 31, 1971, McCray was placed in a cell on the "south wing" of the Maryland Penitentiary. 367 F. Supp. at 1212. The cell had not been cleaned prior to McCray's placement therein and contained "paper, dirty blankets, a metal locker and other trash lying on the floor." *Id.* This refuse was swept by McCray to the front of the cell after his request to have the cell cleaned was denied. On the next morning, January 1st, the trash in McCray's cell caught on fire.[2]

[2] Respondent "alleged that he dozed off with [a] lit cigarette in his hand, and when he awoke the cell was filled with smoke. He testified that he did not set the fire intentionally but he was charged with purposely causing the fire." 367 F. Supp. at 1212. Petitioner Burrell, the "duty captain whose responsibility was the operation and administration of the entire penitentiary on the 8 a.m. to 4 p.m. shift, "*Id.*, testified that he believed McCray may have intentionally set the fire. *Id.* at 1213. The district court made no specific finding resolving this issue.

After a delay in bringing the fire under control (a delay caused in part by a faulty fire extinguisher) McCray was taken to the infirmary to be treated for burns caused by the fire. Burrell, stating that he believed that McCray had intentionally set the fire,[3] concluded that McCray was "mentally unstable" and ordered his placement in a "mental observation" cell. *Id.* at 1213. McCray was promptly taken to that cell, stripped of all clothing, and placed in it. The mental observation cell was a completely bare "strip" cell which had concrete walls, a concrete ceiling, and a tile floor. The windows were covered with sheet metal, but the cell had an electric light. This cell was without furnishings of any kind and had an "oriental" toilet, a hole in the floor six to eight inches across, which flushed automatically from outside the cell and was "covered by a removable metal grate which was encrusted with the excrement of previous occupants." 516 F.2d at 367. McCray was continually confined in this cell without clothes or blankets for approximately two days, even though the floor was so cold it was "impossible to sleep." *Id.* During this time McCray was not seen by a physician, nurse, psychiatrist, psychologist, or any other medical personnel.[4] Nor was McCray "permitted to

[3] Petitioner Burrell testified that he "was informed by Sgt. Witte that Inmate McCray had set his cell on fire." App. 171a.

[4] Petitioners state in their Brief (at 94) that "Mr. Musk, the institutional psychologist, acknowledged that he was familiar with the incident and the fire in January, 1972, and *that he saw respondent in the isolated confinement area.* (T.383-84)" (Emphasis added). This contention, however, is entirely inconsistent with the district court's finding that a psychologist did *not* see McCray while he was in the mental observation cell, 367 F. Supp. at 1213, and Mr. Musk's own testimony that he was on vacation and out of the institution until January 4, 1972. (App. 131a). Mr. Musk did testify, however, that he had interviewed Mr. McCray on many occasions, both at the Penitentiary (App. 112a) and while Mr. McCray was a prisoner at Patuxent. (App. 114a; 62a).

bathe, shave, have or use articles of personal hygiene, including toilet paper," or receive reading or writing materials. *Id. See also*, App. 147a-151a, 154a. In sum, McCray spent approximately 48 uninterrupted hours without clothes in a totally barren cell.

E. The facts in *Smith v. McCray*

On November 19, 1971, (App. 74a), McCray was confined in a cell on the "street side" of the "south wing" of the Maryland Penitentiary. 367 F. Supp. at 1211. Because this cell was in an "unsanitary condition,"[5] *Id.* McCray complained to petitioner Smith, a sergeant on the day shift (8 A.M. - 4 P.M.) and the officer in charge on the "south wing". App. 74a, 77a. Sergeant Smith then removed McCray to the lowest tier of the "south wing", *Id.* where McCray was, fortuitously, able to air his complaints with the warden. App. 48a. After McCray communicated his complaints to the warden he was moved to another cell on the "yard side" of the "south wing". The warden ordered petitioner Smith to make available to McCray all books and materials kept in his regular cell. 367 F. Supp. at 1211; 516 F.2d at 365.

When McCray did not receive his law books, he began "hollering and yelling", 367 F. Supp. at 1211, creating a "substantial disturbance". *Id.* Petitioner Smith then transferred McCray to the "isolated confinement area (I.C., known to the inmates as the 'hole')", *Id.*, in order to prevent a "greater disturbance". *Id.* While McCray was

[5] McCray testified without contradiction that the cell was "filthy," with "trash, dirt, torn mattresses, [and] parts of mattresses on the floor." (App. 47a).

being transferred he began "shouting insults and threatening to do bodily harm to himself". *Id.* Petitioner Smith interpreted these threats "as an indication of mental and emotional instability". *Id.* McCray was thereupon (at 11:30 A.M. on November 20) placed without clothes in a concrete, isolated confinement cell which was completely bare of any furnishings except for a toilet, sink, recessed light, and a "one foot high concrete slab, 6 to 8 feet long and 3 feet wide, which was McCray's bed." 516 F.2d at 365. While McCray was furnished with no bedding or blankets upon his initial placement in the isolated confinement cell, 516 F.2d at 365-366, during the night, a prison guard gave him a mattress. "McCray testified that it was so cold that he tore open the mattress, which was old and deteriorated, and dug a channel down in the cotton so that he could sleep nestled in the mattress. Subsequently, McCray was disciplined for destroying the mattress." *Id.*

On the morning of November 21st petitioner Smith re-entered the isolated confinement area where McCray was confined and "found that he had defecated into a cup and smeared feces over himself and the cell wall". *Id.* After having McCray bathed and the cell scrubbed, McCray was returned to the isolated confinement cell for another 24 hours, and the penitentiary psychologist was notified. On the next day, November 22nd, McCray was returned to his regular cell since, according to Smith, he "started acting alright". *Id.*

During the approximately two days McCray spent confined in the isolated confinement cell he was denied his clothing and, with the exception of the mattress, all other material goods including articles with which to clean himself and the cell, reading material and writing material. He was "fed in plastic cups during this two day period". *Id.*

SUMMARY OF ARGUMENT

The scope of 42 U.S.C. §1983, its availability to state prisoners, its relationship to state administrative grievance procedures, and the federalism and comity questions raised by that relationship, are, according to Petitioners, undecided issues which are capable of resolution through the instant litigation. Petitioners further claim that the increased number of prisoner lawsuits, which have been filed in the federal courts, can be decreased by a ruling from this Court favorable to the prisoner grievance mechanism established by the State of Maryland. The Attorneys General of thirteen other states have filed an amicus brief urging the Court to accept Maryland's contentions.

Respondents agree that the heavy caseloads of federal courts and the need for speedy and effective resolution of prisoner complaints are matters of national concern. Respondents do not agree, however, that the Maryland Inmate Grievance Commission provides an answer to those problems, and more importantly for this case, Respondents do not agree that the scope, availability and purposes of 42 U.S.C. §1983 are in doubt, or that the questions raised by Petitioners can or should be addressed by this Court in the present case.

Respondents will first establish that the cases at bar do not present the factual context necessary for a resolution of the questions proposed by Petitioners. Two of the four cases, *Burrell v. McCray* and *Smith v. McCray*, have been decided on the merits by the District Court and the Court of Appeals. In addition, because they and *Boslow, et al. v. Washington*, are exclusively damage cases, the Inmate Grievance Commission is clearly an inadequate state remedy, and therefore, the Court need not, and should

not, reach the broader question of whether the Commission would be an adequate state remedy under other circumstances.[6] Furthermore, in *McClellan, et al. v. Stokes*, where equitable relief is requested, resolution of the issues raised by the complaint does not involve the exercise of any agency expertise, but rather, the issues require a judicial determination in the first instance.

The proposition that prisoners may be treated differently from all other §1983 complainants through the imposition of an exhaustion requirement cannot be maintained. See, *e.g.*, *Cruz v. Beto*, 402 U.S. 319 (1972). Respondents will establish that the history of 42 U.S.C. § 1983, both legislative and judicial, clearly supports the decision of the Fourth Circuit in the instant cases. *McCray v. Burrell*, 516 F.2d 357 (4th Cir. 1975). Petitioners also suggest that recent "exceptions" to the rule of non-exhaustion in §1983 cases indicate the appropriateness of creating an exception in prisoner cases. Petitioners, however, misconstrue the cases they cite, and generalize from them to an untenable position which would deny state prisoners due process of law.[7]

Considerations of comity and federalism, which Petitioners also urge as a basis for an exhaustion requirement,[8] have been reviewed by this Court in the context

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[6] *McClellan, et al. v. Stokes* is also a claim for damages as well as injunctive relief.

[7] For example, Petitioners rely on *Gibson v. Berryhill*, 411 U.S. 564 (1973), which, if suggesting an exception to the no-exhaustion rule at all, concerns concepts of finality and ripeness and applies only to the exhaustion of prospective remedies rather than retrospective remedies such as the Inmate Grievance Commission. Similarly, Petitioners refer to *Preiser v. Rodriguez*, 411 U.S. 475 (1973), as "a new departure" (Pet.Br. 85) when, in fact, *Preiser* specifically rejected the suggestions put forth by Petitioners in the present case. See, *e.g.*, 411 U.S. at 492 n.10.

[8] Petitioners' principal argument seems to be that since Maryland has created an Inmate Grievance Commission, the federal courts should require §1983 litigants to resort to it.

of §1983 complaints and prisoner cases, but such considerations have never been allowed to restrict the access of a proper §1983 plaintiff to the federal courts, since to create such a restriction would violate the Congressional mandate and the long judicial history of §1983 which has affirmed that the federal courts are the principal protectors of the constitutional rights of all citizens. See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961). If the scope of §1983 is to be altered, it should be done by Congress with a statutory amendment rather than by this Court with a judicial decree.

The District Court decision was based in part on the supposition that requiring Maryland prisoners to file their constitutional claims with the Inmate Grievance Commission would reduce the Court's caseload. As Respondents point out, *infra* in Part II.D., those expectations are illusory, and an exhaustion requirement will not bring about any real benefits to the federal courts. In addition, there is a variety of alternative means by which the federal courts can efficiently manage the prisoner caseload without this Court having to take the drastic and unprecedented action of requiring exhaustion of state remedies in an action properly brought under §1983. There are also many administrative methods which the state prison systems may employ to reduce the need for prisoners to resort to the federal courts for relief. Further, to require exhaustion of the inadequate remedy proposed by the State in this case would only serve to "brush under the rug the problems of those who are found guilty and subject to criminal sentence."[9] Even if an exhaustion rule were to be created for prisoner §1983 cases, the procedures and operation of the Maryland

[9]Chief Justice Burger. *Our Options Are Limited*, 18 Villanova L. Rev. 165, 167.

Inmate Grievance Commission do not satisfy the minimum standards of due process which have to be met by a state administrative remedy if it is to be the subject of an exhaustion requirement.

The district court held full evidentiary hearings in *McCray v. Burrell*, No. 74-1042, and *McCray v. Smith*, No. 74-1043, to review allegations by McCray that his confinement in a "mental observation" cell (*Burrell*) and an "isolation" cell (*Smith*) denied him, in each instance, federally protected rights. The court concluded that in neither case had McCray been subjected to unconstitutional treatment. Reversing, the United States Court of Appeals for the Fourth Circuit found in McCray's action against Burrell, two violations of the Eighth Amendment: "First, the record reveals that the conditions of confinement in the mental observation (M.O.) cells in which McCray was kept fall far short of the current standards of decency of present-day society." 516 F.2d at 369. Second, even assuming that the conditions of isolated confinement did not constitute a *per se* violation of the Eighth Amendment, the deprivations, discomforts and suffering resulting from such confinement should have been alleviated, and less barbarous means of protection should have been provided by Burrell. *Id.* The failure of Burrell, upon learning that expert medical help was not forthcoming for McCray within a reasonable period of time, to devise and employ means to protect McCray from injuring himself other than by continued isolation while being deprived of clothing and elements of personal hygiene, violated McCray's right to be free from cruel and unusual punishment.

In McCray's suit against Smith, the Court of Appeals held that although a prisoner, who exhibits a mental condition which suggests that he may harm himself or

others, may be removed from the general population and subjected to protective measures, the confinement of McCray, naked, in isolation, for two days, without any immediate effort by Smith to obtain a prompt medical evaluation and necessary treatment for McCray, violated his Eighth Amendment rights. *Id.* at 368-69. While recognizing that the isolation of a prisoner for his own protection and the safety of the prison may be a rational means to reach a permissible end, the confinement of McCray, under the conditions and for the length of time in this case, without securing medical attention for him, was arbitrary, unreasonable and unnecessary. See, *Id.* at 368 n.3.

In both *Burrell* and *Smith* the initial decision to separate McCray from the general prison population was based upon the prison officials' judgment that such action was necessary to preserve institutional security and order. The confinement of McCray in isolation was not for punishment, however, but for his own self-protection. Burrell and Smith offered as justification for the nature and conditions of isolated confinement in these cases, the need to protect McCray from self-injury.

The Court of Appeals, however, rejected that rationale. First, the *conditions* (and length) of confinement in the solitary cells, and the *process* by which the confinement was imposed did not bear any reasonable relationship to the purpose of the confinement. See, *e.g.*, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *O'Connor v. Donaldson*, ____ U.S. ____, 95 S.Ct. 2486, 2493 (1975). Second, the conditions which existed in the solitary cells are not consistent with minimal concepts of human dignity and evolving standards of decency and are not acceptable to contemporary society. See, *e.g.*, *Furman v. Georgia*, 408 U.S. 238, 277, 291 (1972).

At the time of McCray's confinement in isolation, there was in effect a Maryland Division of Correction regulation which governed the use of solitary confinement, but it was not followed by Burrell or Smith. The Court of Appeals found that "[i]n permitting [solitary] confinement, the prison directive comports with the eighth amendment," 516 F.2d at 368, but when the measures taken to protect a prisoner from self-injury are isolated, naked, in a barren cell, as in these cases, the directive also states the constitutional minimum in requiring that if medical and psychological help is "not forthcoming within a reasonable period of time, the deprivations, discomforts and suffering resulting from such confinement must be alleviated and less barbarous means of protection must be provided." *Id.* at 369.

Petitioners argue that the Court of Appeals erred because it elevated a prison regulation to constitutional dimension and found that mere violation of such a regulation by a prison official entitles a prisoner to relief in federal court. These claims misconstrue the Fourth Circuit's decision and obfuscate the issues before this Court. The analysis used by the Fourth Circuit in looking to standards adopted by administrators as a benchmark of minimum constitutional requirements is an established judicial technique and recognizes the proper deference which the federal courts give to prison officials in the administration of state prisons.

I.

THE DECISION BELOW SHOULD BE AFFIRMED WITHOUT THIS COURT REACHING THE BROAD QUESTION OF WHETHER A STATE PRISONER MAY BE REQUIRED TO EXHAUST STATE ADMINISTRATIVE REMEDIES BEFORE BEING PERMITTED TO PROCEED IN FEDERAL COURT UNDER 42 U.S.C. §1983.

This case concerns four separate and distinct actions which were filed by three Maryland prisoners against prison officials alleging violations of the plaintiffs' constitutional rights. All of the cases were filed in proper person in the United States District Court for the District of Maryland under 42 U.S.C. §1983. They were dismissed on the ground that the plaintiffs had not exhausted state administrative remedies by petitioning the Maryland Inmate Grievance Commission for relief.

Although the State of Maryland is apparently anxious to have this Court decide the question of whether the exhaustion of administrative remedies may be required of a state prisoner in an action properly brought under §1983, that issue need not be decided in any of these cases. The decision of the Court of Appeals can and should be affirmed on narrower grounds.[10]

A. *Burrell v. McCray* and *Smith v. McCray*

McCray filed civil rights actions against Burrell and Smith who subjected McCray to cruel and unusual pun-

[10] It is well established that this Court "will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" (Citation omitted). *Ashwander v. T.V.A.*, 297 U.S. 288, 347 (1936). Mr. Justice Brandeis, concurring. See also, *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972).

ishment and a denial of due process of law when, on two separate occasions, McCray was needlessly and arbitrarily locked into isolation cells under excessively harsh conditions of confinement. In each case, McCray requested damages for the injuries he sustained and for violations of his constitutional rights.

The District Court appointed counsel to represent McCray, and after a three-day trial, ruled against McCray on the merits. The Court of Appeals also reached the merits of both cases in reversing the judgments of the District Court and remanding the cases for further proceedings to determine if McCray is entitled to damages or if Burrell and Smith may avail themselves of a qualified immunity and good faith defense. Under these circumstances, it would be duplicative and wasteful for McCray to have to begin his cases all over again before the Inmate Grievance Commission.

Furthermore, the Commission cannot grant McCray the relief he seeks because the Commission does not have the authority to award either compensatory or punitive money damages. See, Petitioners' Brief, p. 19. See also, *McCray v. Burrell*, 516 F.2d 357, 365 (4th Cir. 1975); *Washington v. Boslow*, 375 F.Supp. 1298, 1300 (D. Md. 1974).

An administrative remedy is deemed to be inadequate, and therefore, not subject to the exhaustion requirement, when the agency is not empowered to grant effective relief. *Gibson v. Berryhill*, 411 U.S. 564, 575 n. 14 (1973). In addition, this Court has held that "a damage action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies." *Preiser v. Rodriquez*, 411 U.S. 475, 494 (1973). See also, *Ray v. Fritz*, 468 F.2d 586, 587 (2nd Cir. 1972); *Jones v. Decker*, 436 F.2d 954 (5th Cir. 1970).

An award of damages is a significant, if not the principal, means of protecting a citizen's constitutional rights from violations by government officials. This Court has held that where a person's home was invaded by federal agents, who ransacked it and subjected the people who lived there to innumerable indignities, "[i]t will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief. . . . For people in Bivens' shoes, it is damages or nothing." *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 409-410 (1970). In fact, it has been forcefully argued that the civil rights statutes can best be enforced by providing damages for violations of the Fourteenth Amendment. Niles, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 Tex. L. Rev. 1019 (1967).

> "The availability of damages is a matter of particular importance to the poor. By definition and experience, civil liberties for them are matters of crucial economic significance. Yet the poor have insufficient impact upon the agencies providing them welfare, housing, medical, police, and educational services, to effect policy changes through customary channels, such as political, administrative, or legislative appeals. As a consequence they are subject to recurring abuses. The best corrective for such abuses is a remedy in damages, which compensates for injuries and deters future misconduct." LaFrance, *Federal Litigation for the Poor*, Ariz. St. Univ. L.J. (1972) 20, 60.

Indeed, what better deterrent is there to prevent a prison guard from treating prisoners in the brutal manner in which respondent McCray was treated if it is not the threat of damages?

There is substantial reason to believe that even if McCray were forced to file his claims with the Inmate

Grievance Commission, the Commission would not rule upon them. In a deposition of the Commission's Executive Director (App. 283a), he described how a complaint analogous to McCray's claims was summarily dismissed without a hearing.

(290a)

Q. All right. What other complaints, if any, did he [the prisoner] raise in that letter [to the Commission] besides those two? A. That his punishment is disproportionate to his offense.

Q. That is No. 3. That is all there is to No. 3? (35) A. Do you want me to read the whole thing?

Q. It's a little difficult—you're right, that is nonspecific. A. "In accordance with Wright versus McMann, 460 F.2nd 126 (2nd Cir. 1972) 'No punishment disproportionate to the offense (and therefore cruel and unusual).' I was put into a cell with no bed, blanket, sheet—just a sink and toilet and I had all clothes taken from me."

Now, as a result of experience, what he means by that is that he was thrown into the hole for a brief period of time as a result of something that he did that caused the administration to think he needed a cooling-off period.

Q. Does that raise—that again doesn't raise a substantial question for the Grievance Commission? It cer-

(291a)

tainly isn't lacking in specificity. A. It isn't? It is to me.

Q. You just related exactly what happened to him. He was thrown into the hole. A. All he is saying here is that he was thrown in the hole and that is punishment disproprotionate to the (35A) offense.

Q. And your position upon reading that is that simply is not punishment disportionate to the offense?

(Mr. Stutman) One must know what the offense is.

(The Witness) That's right. I don't know what the guy is talking about.

Q. That's what I'm getting at, Mr. Lusby. I don't mean to spend so much time on this particular case, but now that this comes up, I'm wondering why this man didn't have a hearing? A. We tried three times to get him to tell us and this is the type of thing that we get.

Q. Well, this letter that you are reading now is his most recent letter, is that right? A. That's right.

Q. And his third allegation, as I understand from what you read, is that he was placed into what you referred to as the hole, I think he said isolation, for an unspecified period of time. A. And I imagine he's on M-1 now, administrative segregation.

(36) Q. Was this case investigated? Is there anything in the file that indicates it was investigated? A. No, because I don't consider he ever filed a specific grievance.

Q. Has the question of being put in isolation at Patuxent ever been litigated before the Commission? A. Just the mere placing of a person in isolation?

Q. Yes. A. No. The question has arisen several times as to whether it was proper in the circumstances for that patient. You see, what I'm trying to get across to you, if he would say something like that, then we've got a grievance.

(292a)

Q. Well, is the complaint that you received from him so much different from the complaints you normally receive from inmates? A. Yes.

Q. In what respect? A. They usually tell me what's bothering them and what they want done about it, what they think the administration or the institution has done wrong and what they want (37) done about it. This guy never tells me.

Q. Well, in the normal course of affairs, the Inmate Grievance Commission investigates complaints that come into the office, is that right, most complaints? A. Right.

Q. And again, I don't mean to argue with you about this case, but it appears to me—let me ask you in the form of a question. Doesn't it appear to you now, looking back at this file, at least No. 3, we talked about No. 1 and No. 2, but at least grievance No. 3 is a substantial question? Although admittedly it's not pleaded with the greatest degree of specificity, he does plead that he was placed into isolation under rather serious conditions of confinement, and he is raising the question of whether that punishment was disaproportionate to whatever offense he was put in there for, and my question is, isn't that an issue that the Grievance Commission can deal with? A. What you have stated is an issue that the Inmate Grievance Commission can deal with.

Q. Isn't that what is in the letter? A. All I can say, Mr. Morgan, is maybe he's trying (38) to say that, but he doesn't say it.

Q. Are there any complaints raised in that letter besides those three, Mr. Lusby? A. "Decent conditions in solitary confinement."

Q. Is that a quote– A. By that –

Q. Is this point No. 4? A. Yes.

Q. Maybe you could read point No. 4? A. "In accordance with Landman versus Royster, 338 F.Supp. 621 (E.D. Va. 1971). I am allowed 'decent conditions in solitary confinement,' which was denied me."

(293a)

What he is saying there is he doesn't like the fact –he doesn't like the conditions on administrative segregation. Once again, we have heard many specific cases with regard to administrative segregation.

Q. Does he use the term there administrative segregation? A. No.

Q. He uses the term solitary confinement? A. Yes.

(39) Q. From your experience at Patuxent, there is a difference between solitary confinement and administrative segregation, isn't there? A. He's talking about segregation, I would say.

Q. Well, it's possible– A. Once again, we're talking about this vague thing, you know. You are asking me to give answers and I've got to–I'm trying to imagine what it is and, as a result of my experience, I think he's talking about M-1, administrative segregation.

Q. And that is commonly referred to as solitary confinement? A. Yes.

Q. It is? A. Yes.

Q. All right. With regard to point No. 4, what you are saying is that the complaint was dismissed, if I read correctly what your answer was, the complaint was dismissed because the conditions of administrative segregation at Patuxent have already been raised before the Commission and the Commission has already issued a (40) ruling on those conditions? A. Yes, several.

The hopelessness and futility of McCray's pursuing his claims through the Inmate Grievance Commission are further evidenced by the Commission's statistic that of 19 complaints decided by the Commission through February 28, 1974, made by prisoners claiming some physical mistreatment by guards, the Commission found all 19 complaints to be wholly without merit. See, App. 338 and the deposition of Dene L. Lusby at 150. Exhaustion is unnecessary under such circumstances. See, *Evans v. Cunningham*, 355 F.2d 491 (4th Cir. 1964); *Woods v. Steiner*, 207 F.Supp. 945, 954 (D. Md. 1962).

B. McClellan, et al. v. Stokes

Stokes filed a complaint under 42 U.S.C. §1983 seeking an injunction against enforcement of the censorship policies at the Maryland Penitentiary and damages for interference with his First Amendment rights. The District Court dismissed Stokes' complaint without an adjudication on the merits, but nevertheless, exhaustion of administrative remedies should not be required in his case.

First, the Inmate Grievance Commission cannot award damages to Stokes. See, Part I.A., *supra*.[11] Second, Stokes' claim for equitable relief is based on his challenge to Maryland Division of Correction regulations which he alleges are unconstitutional on their face. A resolution of these issues does not involve the exercise of any agency expertise or discretion, and therefore, exhaustion should not be required. See, *U.S. ex rel. Brooks v. Clifford*, 412 F.2d 1137, 1140 (4th Cir. 1969); *U.S. ex rel. Marrero v. Warden, Lewisburg Penitentiary*, 483 F.2d 656, 659 (3rd Cir. 1973), rev'd on other grounds, 417 U.S. 653 (1974). *Cf., McKart v. United States*, 395 U.S. 185 (1969).

A second factor leading us to hold that the administrative remedy was inadequate is that the constitu-

[11] It is very possible that the Commission would dismiss Stokes' equitable claim without even affording him a hearing. The Commissioner's Executive Director testified in his deposition about an analogous case where a prisoner at Patuxent Institution claimed that his out-going mail should not be subjected to censorship. The grievance was administratively dismissed without a hearing on the grounds that a prison regulation permitted such censorship ("Because we have heard many cases relating to mail privileges and I am familiar completely with the mail rules, and his statement that his outgoing mail is not subject to censorship is totally incorrect." App. 289.) and similar claims had been heard before by the Commission and rejected. (App. 288-90).

> tional issues raised by this case, particularly in the First Amendment area, lie within the expertise of courts, not the expertise of administrators (footnote omitted). *Plano v. Barker*, 504 F.2d 595, 599 (2nd Cir. 1974).

The Maryland Inmate Grievance Commission is not equipped, nor should it be required, to perform what is a purely judicial function. See, *Wills v. United States*, 384 F.2d 943, 945 (9th Cir. 1967), cert. denied, 392 U.S. 908 (1968).[12]

C. Boslow, et al. v. Washington

John Washington filed a complaint in the District Court under §1983 alleging that he had sustained a broken rib which a prison doctor refused to treat. Washington was in pain for several months, and his rib healed improperly as a result of being denied medical care. Washington requested declaratory relief and an award of compensatory and punitive damages. He demanded a jury trial. The District Court dismissed Washington's complaint without deciding the merits of his claims because Washington had not applied for relief from the Inmate Grievance Commission.

Washington should not be required to resort to the state administrative agency for relief. The Inmate Grievance Commission is an inadequate remedy because it cannot award money damages. See, Part I.A., *supra*. In addition, an exhaustion requirement would serve no

[12] "[W]here a statute is attacked on its face as denying a right; in that instance, there would be no need for the application of agency expertise with the development of a factual record." Petitioners' Brief, p. 80, n. 31.

purpose at all since Washington has demanded a jury trial. This Court had held, under analogous circumstances, where both legal and equitable issues are present in a case, that only under the most imperative conditions (none of which the Court could anticipate), can the right to a jury trial of the legal issues be lost through a prior determination of the equitable claims. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472-73 (1962). See also, *Ross v. Bernhard*, 396 U.S. 531 (1970). Even if the Commission were to hear Washington's case and make a declaration that Washington's claims are meritorious or not meritorious, he would be entitled to return to federal court for a jury trial of all the issues. Under the rationale of *Dairy Queen*, the Commission's findings would be inadmissible as evidence before the jury, and the exhaustion requirement would have been merely a needless exercise in futility.

II.

THE COURT OF APPEALS WAS CLEARLY CORRECT IN DECIDING THAT A MARYLAND PRISONER, WHO ALLEGES VIOLATIONS OF HIS CONSTITUTIONAL RIGHTS ARISING OUT OF HIS IMPRISONMENT, MAY NOT BE REQUIRED TO EXHAUST STATE ADMINISTRATIVE REMEDIES BY PETITIONING THE MARYLAND INMATE GRIEVANCE COMMISSION FOR RELIEF BEFORE BEING PERMITTED TO PROCEED IN FEDERAL COURT UNDER 42 U.S.C. §1983.

A. A long and uniform series of Supreme Court decisions which should not be overruled hold that the federal courts have the primary responsibility for securing the federal rights of all citizens including those affected by administrative action.

It was the specific intent of Congress in enacting 42 U.S.C. §1983 that the protection of federal rights not be made to depend upon any state remedies, either judicial or administrative, whether available or adequate, in theory or in practice. *Mitchum v. Foster*, 407 U.S. 225, 239-242 (1972); *Zwickler v. Koota*, 389 U.S. 241, 245-247 (1967); *Conover v. Montemuro*, 477 F.2d 1073 (3rd Cir. 1973). At the end of the Civil War in 1965, the Ku Klux Klan, formed in 1866, conducted a reign of terror and violence that prompted President Grant to ask Congress for legislation to alleviate the problem. *District of Columbia v. Carter*, 409 U.S. 423, 426-429 (1973). Congress responded with §1 of the Ku Klux Klan Act of 1871, Act of April 20, 1871, §1, 17 Stat. 13. The Act was later codified as 42 U.S.C. §1979, and, later, as 42 U.S.C. §1983. No major revisions occurred with either codification.

In a series of decisions beginning with *Monroe v. Pape*, 365 U.S. 167 (1961) and continuing through *Huffman v. Pursue*, 420 U.S. 592 (1975), the Supreme Court has established the rule that exhaustion of state administrative remedies is unnecessary in a civil rights action brought under 42 U.S.C. §1983. The federal remedy is supplementary to any state remedies. The Court has strictly adhered to the principles that the adequacy or availability of a State remedy is irrelevant, and that civil rights plaintiffs may invoke the jurisdiction of the federal courts for the initial review of their complaints.

> We have previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy. We stated in Monroe v. Pape, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492:
>
> > "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *McNeese v. Board of Education*, 373 U.S. 668, 671 (1963).

In *McNeese*, the specific holding of the Court was that the purposes of 42 U.S.C. §1983 would be defeated "if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court." 373 U.S. at 672. Subsequently, in *Damico v. California*, 389 U.S. 416 (1967) (*per curiam*), the Court interpreted *McNeese* to include the principle that

> "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy." (brackets in original). 389 U.S. at 417.

See also, *Carter v. Stanton*, 405 U.S. 669 (1972); *Metcalf v. Swank*, 406 U.S. 914 (1972).

It may be argued that the holding in *McNeese*, standing by itself, did not fully resolve the question of whether there are circumstances when exhaustion of state administrative remedies may be required in a §1983 case since the Court appeared to qualify its holding by adding that

> [m]oreover, it is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights. 373 U.S. at 674-75.

In *Damico*, however, the three-judge District Court whose decision was reversed by the Supreme Court had found that the plaintiffs had " 'failed to exhaust *adequate* administrative remedies.' " (emphasis added). 389 U.S. at 417.[13]

The next occasion on which the Supreme Court considered the question of whether exhaustion of state remedies may be required in a §1983 action was in a case brought by a Pennsylvania state prisoner who alleged that prison officials had violated his constitutional rights by confiscating his legal papers and materials. The Court reviewed the nature of the state administrative remedy and held that

> [i]n light of this it seems likely that to require petitioner to appeal to the Deputy Commissioner of Correction, the Commissioner, or to the Attorney

[13] The dissenting opinion of Mr. Justice Harlan in *Damico* confirms that there was an adequate state administrative remedy available to the plaintiffs. The majority of the Court, however, held that exhaustion of that remedy was unnecessary.

> General would be to demand a futile act. In any event, resort to these remedies is unnecessary in light of our decisions in Monroe v. Pape; McNeese v. Board of Education; and Damico v. California. (full citations omitted). *Houghton v. Shafer*, 392 U.S. 639, 640-41 (1968) (*per curiam*).

As in *McNeese*, where the Court appeared to qualify its decision by finding that the state remedy was inadequate, the Court in *Houghton*, while holding that resort to state administrative remedies was unnecessary, also found that exhaustion of state remedies under the circumstances there would be an exercise in futility. In *Wilwording v. Swenson*, 404 U.S. 249 (1971) (*per curiam*), however, this Court foreclosed the possibility that its prior holdings could be interpreted to mean anything other than that exhaustion may not be required under 42 U.S.C. §1983 regardless of whether the state remedy is adequate.

Wilwording v. Swenson was a case brought under §1983 by state prisoners challenging prison conditions and disciplinary measures taken against them while confined in maximum security. The Court reaffirmed *Monroe v. Pape*, *McNeese v. Board of Education* and *Damico v. California* and cited them for the proposition that the remedy provided by the Civil Rights Act "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Furthermore, the Court held that

> [s]tate prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs. Houghton v. Shafer, 392 U.S. 639, 88 S.Ct. 2119, 20 L.Ed.2d. 1319 (1968). There an inmate's challenge to the confiscation of his legal materials without first seeking administrative redress was sustained. Although the probable futility of such ad-

ministrative appeals was noted, we held that in "any event, resort to these remedies is unnecessary." (citation omitted). 404 U.S. at 252.

The most recent decisions of the Supreme Court specifically approve the holdings of the earlier cases that the exhaustion of state administrative remedies may not be required in an action brought under §1983. Mr. Justice White delivered the opinion of the Court in *Gibson v. Berryhill*, 411 U.S. 564 (1973):

> . . . . This Court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C., § 1983. McNeese v. Board of Education, 373 U.S. 668 (1963); Damico v. California, 389 U.S. 416 (1967).

In *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974), Mr. Justice Brennan wrote for the Court:

> When federal claims are premised on 42 U.S.C. § 1343(3)—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights. See, e.g., McNeese v. Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961).

The decision in *Steffel v. Thompson, supra*, was explained by Mr. Justice Blackmun writing for the Court in *Ellis v. Dyson*, 421 U.S. 426 (1975):

> Exhaustion of state judicial or administrative remedies in *Steffel* was ruled not to be necessary, for we have long held that an action under §1983 is free of that requirement. (citations omitted).

Petitioners suggest that the decision in *Huffman v. Pursue*, 420 U.S. 592 (1975), which concerned an appli-

cation of the principles of *Younger v. Harris*, 401 U.S. 37 (1971), indicates that there may be circumstances under which this Court would depart from the long-established principle that exhaustion of state administrative remedies may not be required in a § 1983 action; however, Mr. Justice Rehnquist, writing for the Court, stated that "[b]y requiring exhaustion of state appellate remedies for the purposes of applying *Younger*, we in no way undermine *Monroe v. Pape* (citation omitted)." 420 U.S. at 609, n.21.

In their discussion of the *Monroe* decision and its progeny, Petitioners refer to *District of Columbia v. Carter, supra*, for the proposition that the scope of §1983 must be narrowly measured by the purposes of its enactment. (Pet. Br. at 44 n.15). From that hypothesis, Petitioners argue that §1983 may be limited now because it was enacted in response to situations which existed during and after the Reconstruction Era; that is, the problems addressed by the 1871 Congress are not relevant today.

Petitioners have reached the wrong conclusion. Indeed, this Court cited *Monroe* with approval when it held that the legislation passed by the 1871 Congress was not solely to deal with the actions of the Ku Klux Klan but was also intended to modify Congress' former reliance on the states to assure the enforcement of federal Constitutional rights.

> "With the growing awareness that this reliance had been misplaced, however, Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control

over the unconstitutional actions of state officials." *District of Columbia v. Carter*, 409 U.S. at 428.[14]

The need for federal court supervision over the enforcement of federal rights by the states has been reiterated by this Court several times. In *Procunier v. Martinez*, 416 U.S. 396, 405 n.9 (1974), for example, this Court described the difficulties inherent in federal court review of state prisoner litigation and supported the development of "internal administrative procedures for disposition of inmate grievances," but the Court further held that "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims arising in a federal or state institution." *Id.*[15]

[14] The 1871 Congress had several options available to it but rejected them all in favor of making the federal remedy supplementary to any state remedy. For example, civil rights litigants could have been limited to the secessionist states; federal court jurisdiction could have been conditioned on a showing that federal rights would not be enforced by the states (compare, 28 U.S.C. §1443, the removal statute); or, the lower federal courts could have been vested with appellate jurisdiction to review state decisions (see, *Monroe v. Pape, supra* at 195-98, Mr Justice Harlan, concurring). The Congress did not resort to these or other alternatives but rather, it reversed its previous reliance on the states as guarantors of constitutional rights and vested this duty in the federal courts. *District of Columbia v. Carter, supra* at 427-28. See, Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law and Contemp. Prob. 216, 230 (1948).

[15] In *McNeese v. Board of Education, supra* at 674 n.6, this Court said:

> "We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." [*Stapleton v. Mitchell*, 60 F. Supp. 51, 55 (D. Kan. 1945)].

See, generally, Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 Harv. L. Rev. 1352, 1356-58 (1970).

Petitioners also argue that *Monroe v. Pape* was incorrectly decided in finding access to the federal courts for enforcement of constitutional claims to be supplementary to any state court remedy.[16] They cite Mr. Justice Frankfurter's dissent in *Monroe* to support their argument (Pet. Br. at 45-46) which appears to be that whenever there exists an available and adequate state remedy, it must be exhausted before the plaintiff may gain access to federal court. Not only did the majority reject that argument in *Monroe*, but the concurring Justices and Mr. Justice Frankfurter, in dissent, rejected it as well.

> Manifestly the applicability of the section in an action for damages cannot be made to turn upon the actual availability or unavailability of a state law remedy for each individual plaintiff's situation. Prosecution to adverse judgment of a state court damage claim cannot be made prerequisite to § 1979 [§1983] relief. In the first place, such a requirement would effectively nullify §1979 as a vehicle for recovering damages. (footnote omitted). In the second place, the conclusion that police activity which violates state law is not 'under color' of state law does not turn upon the existence of a state tort remedy. *Monroe v. Pape, supra* at 246, Mr. Justice Frankfurter, dissenting.

[16] It is certainly late in the day to launch an attack on the correctness of *Monroe v. Pape* in light of the numerous Supreme Court cases which have followed it, the inaction on the part of Congress in legislatively modifying it and the absence of any compelling reason to overrule it. See, *McGee v. United States*, 402 U.S. 479, 483 n.6 (1971). Compare, *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

[17] Mr. Justice Frankfurter then gave the following example of cases in which the propriety of a §1983 action would be unquestioned: "If [a plaintiff] can show that defendant's conduct is within the range of executive discretion in the enforcement of a state statute, or municipal ordinance, §1979 [§1983] will apply. See *Hague v. C.I.O.*, 307 U.S. 496. . . ." *Id.* Arguably, all actions taken by prison officials would fall within this description.

In their concurrence, Justices Harlan and Stewart read the legislative histroy of §1983 to support the conclusion that the availability or adequacy of a particular state remedy is irrelevant. *Id.* at 197. They concluded that "a deprivation of a constitutional right is signficantly different from and more serious than a violation of a state right and therefore deserves a different remedy, even though the same act may constitute both a state tort and the deprivation of a constitutional right." *Id.* at 196.

The substantial and uniform series of decisions by this Court since *Monroe v. Pape* establishes the rule that in an action brought under 42 U.S.C. §1983, the plaintiff may not be required to exhaust state remedies before being permitted to proceed in federal court. The plaintiff need not exhaust a state administrative remedy even where the remedy is available and adequate. "State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." *Wilwording v. Swenson*, 404 U.S. at 252.[18]

[18] The decision below, a unanimous decision by the Court of Appeals *en banc*, is based upon settled law and is clearly correct. See also, *Jones v. Metzger*, 456 F.2d 854, 856 (6th Cir. 1972); *Beale v. Blount*, 461 F.2d 1133, 1139 n. 11 (5th Cir. 1972); *Shelton v. Union County Board of Commissioners*, 483 F.2d 1406, 2 Prison L. Rptr 578 (7th Cir. 1973) (unpublished *per curiam* opinion); *Brooks v. Center Township*, 485 F.2d 383, 386 (7th Cir. 1973); *McClelland v. Sigler*, 456 F.2d 1266, 1267 (8th Cir. 1972); *Raper v. Lucey*, 488 F.2d 748, 751 n. 3 (1st Cir. 1973); *Conover v. Montemuro*, 477 F.2d 1073, 1079 (3rd Cir. 1973); *Padilla v. Ackerman*, 460 F.2d 477, 479 (9th Cir. 1972); *Gillette v. McNichols*, 517 F.2d 888, 890-91 (10th Cir. 1975).

v. *Preiser v. Rodriguez*, 411 U.S. 475 (1973), establishes the rule that a state prisoner may not be required to exhaust state administrative remedies before proceeding under 42 U.S.C. §1983 with a challenge to the conditions of confinement.

In *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973), this Court held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." The Court's decision turned on the question of "whether the specific federal habeas corpus statute [28 U.S.C. §§2241 and 2254], explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement, must be understood to be the exclusive remedy available in a situation like this where it so clearly applies." *Id.* at 489.[19] The Court looked to congressional intent in deciding the issue.

> In amending the habeas corpus laws in 1948, congress clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief under those laws. It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings. In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement,

[19] The prisoner plaintiffs in *Preiser* were seeking restoration of good time credits alleging that such a cause of action could be brought under the broad language and literal terms of §1983.

and that specific determination must override the general terms of §1983. *Id.* at 489-90.[20]

The underlying issue of principal importance of the parties in *Preiser* was whether the prisoner plaintiffs had to exhaust state remedies before being permitted to proceed in federal court. The Supreme Court could have held that all prisoner complaints must be treated by the federal courts as habeas corpus petitions with the attendance exhaustion requirements. That expansive approach was rejected, however, and the Court limited its decision in holding that habeas corpus is the exclusive federal remedy only when a prisoner's action lies at the "core of habeas corpus." *Id.* at 489.[21] On the other hand, "a §1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody." *Id.* at 499.[22]

[20] The Court noted that there are circumstances where habeas corpus may be an alternative remedy to a proper action under §1983, but it did not hold that any such action must be brought under habeas corpus with its attendant exhaustion requirements. *Id.* at 498-99. See also, *Wolff v. McDonnell*, 418 U.S. 539, 554 (1974); *Humphrey v. Cady*, 405 U.S. 504, 516-17 n. 18 (1972); *Gerstein v. Pugh*, 420 U.S. 103, 107 n. 6 (1975).

[21] As Mr. Justice Brennan pointed out in his dissenting opinion,

> "the Court does not graft the habeas corpus exhaustion requirement onto prisoner actions under the Ku Klux Klan Act, but it reaches what is functionally the same result by holding that the District Court's jurisdiction under the Act is in some instances displaced by the habeas corpus remedy." *Id.* at 503.

[22] The Court noted that habeas corpus is not an appropriate or available federal remedy for a damage claim, and accordingly, "a damage action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies." *Id.* at 494.

This Court should not go beyond the holding in *Preiser* in requiring prisoners to exhaust state remedies in actions brought under 42 U.S.C. §1983. First, in *Preiser*, the Court found an "explicit congressional intent" which would have been "wholly frustrate(d)" had the respondents there been permitted to evade the exhaustion requirement of 28 U.S.C. §2254(b) by "the simple expedient of putting a different label on their pleadings." *Id.* at 489-90. In the present case, there is no specific federal statute which conflicts with the broad language of §1983.

Second, despite the Court's recognition in *Preiser* of the strong federal-state comity considerations, which are the basis of an exhaustion rule, in cases involving disputes between prisoners and state prison officials, *Id.* at 491-92, the Court declined to hold that exhaustion may be required in all such actions. The dissenting opinion in *Preiser* argued, *inter alia*, that the challenges to the actions of the prison administration which were made by the prisoners in that case were no different, in terms of the potential for exacerbating federal-state relations, from the attacks made by the petitioners in *McNeese v. Board of Education*, *Damico v. California* and *Monroe v. Pape*, *supra*, on the various state administrative actions in those cases; therefore, they argued, since exhaustion was not required there, it should not be required under the circumstances of *Preiser*. See *Preiser v. Rodriguez*, *supra* at 492 n. 10.

The Court responded to the dissenting Justices by finding that exhaustion was required in *Preiser* only because of the congressional judgment reflected in the habeas corpus statutes.

> The answer [to the argument made by the dissent], of course, is that in those cases [*McNeese*, *Damico*

> and *Monroe*], brought pursuant to §1983, no other more specific federal statute was involved that might have reflected a different congressional intent. In the present case, however, the respondents' actions fell squarely within the traditional purpose of federal habeas corpus, and Congress has made the specific determination in §2254(b) that requiring the exhaustion of adequate state remedies in such cases will best serve the policies of federalism. *Id.* at 492 n. 10.

The Court did not respond to the question raised in the dissenting opinion by holding that the comity considerations in cases involving prisoners and prison officials are so overwhelming, or that such cases involve relationships so unique, that a special rule of exhaustion is necessary for prisoners, as Petitioners urge in the present case. Therefore, Petitioners are quite clearly incorrect when they conclude that the decision in *Preiser* indicates that "if responsible States develop responsible programs," exhaustion of these "programs" would be required by this Court. Petitioner Brief, p. 60. It is not the availability or adequacy of a state remedy which determines whether a prisoner should be required to exhaust it.[23] While *Preiser* reflects the Court's concern for the difficult comity considerations underlying federal actions brought by state prisoners against prison officials, *Preiser* also establishes that an exhaustion rule will not be imposed unless there is an explicit congressional determination that requiring exhaustion will best serve the policies of federalism.

[23] The no-exhaustion rule of *Monroe v. Pape*, *supra* at 183, "in no way depends upon the inadequacy of state remedies." *Rodriguez v. McGinnis*, 456 F.2d 79, 82 (2nd Cir. 1972), rev'd, *sub nom. Preiser v. Rodriguez*, *supra*, Judge Kaufman, concurring.

C. The Constitutional Right To Access To The Courts May Not Be Restricted To Serve The Interests Of Administrative Efficiency.

The District Court suggested that an exhaustion requirement for prisoners in §1983 cases has become necessary because of the burden which has been placed upon the federal courts by prisoner petitions and complaints. *McCray v. Burrell*, *supra* at 1193-94. Such a requirement would mean that prisoners are held to a stricter standard of exhaustion than any other civil rights plaintiffs. What is at stake in this case is not merely an abstract question of law which, if decided adversely to Respondents, will cause them the temporary inconvenience of having to resort to a state forum. The District Court's decision was, in effect, a declaration that the constitutional rights of prisoners will no longer be protected by the federal courts.

> Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles. *Bivens v. Six Unknown Agents*, 403 U.S. 388, 411 (1970), Mr. Justice Harlan, concurring.[24]

[24] The courts will not sanction a refusal to accept jurisdiction of diversity cases because of congested court dockets. See, *Gilbert v. Gulf Oil Corp.*, 153 F.2d 883, 886 (2nd Cir. 1946), rev'd on other grounds, 330 U.S. 501. See also, *Thermtron Products, Inc. v. Hermansdorfer*, ____ U.S. ____, 44 L.W. 4085 (1/20/76).

In one of the earliest prisoner civil rights cases to come before the Court of Appeals below, the government made the argument that to permit a prisoner to be heard on his claims in the District Court would be to "encourage a flood of such petitions." *Sewell v. Pegelow*, 291 F.2d 196, 198 (4th Cir. 1961). The Court rejected that argument, and the rationale for its decision is plainly applicable to the present cases:

> "We must not play fast and loose with basic constitutional rights in the interest of administrative efficiency." (citation omitted). *Id.*

See also, *Johnson v. Glick*, 481 F.2d 1028, 1030 (2nd Cir. 1973). A similar concern about a potential plethora of groundless claims was expressed by Mr. Justice Frankfurter, dissenting in *Monroe v. Pape*, *supra* at 240 n. 68; however, the argument did not alter the result reached by the Court.

The District Court below concluded that one of the reasons an exhaustion requirement is necessary is because some prisoners have abused the federal process by filing a large number of groundless complaints. *McCray v. Burrell*, 367 F. Supp. at 1195. Merely because some members of a class of litigants may assert frivolous claims, however, the entire class may not be excluded from court. This Court rejected this "frivolity" argument in *Boddie v. Connecticut*, 401 U.S. 371 (1971), and suggested an alternate remedy of imposing sanctions in specific lawsuits rather than barring the litigation wholesale. *Id.* at 381-382. See also, *Delorme v. Pierce Freight Lines Co.*, 353 F. Supp. 258, 260 (D. Ore. 1973).

This Court has recently declared that "[t]he constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to

seek redress for violations of their constitutional rights." *Procunier v. Martinez*, *supra* at 419. See also, *Wolff v. McDonnell*, *supra* at 579; *Ex parte Hull*, 312 U.S. 546, 549 (1944).[25] The due process right to access to the courts applies to civil rights actions under 42 U.S.C. §1983. 418 U.S. at 579-80. A fundamental principle within the concept of due process of law is that the government may not single out a group or class of individuals for discriminatory treatment unless there is good reason to do so,[26] and when such discrimination places a burden on a fundamental constitutional right, it may only be justified by a compelling governmental interest.[27]

The District Court decisions below placed a substantial burden on the right of Maryland prisoners to access to the courts, and Chief Judge Northrop forthrightly articulated his rationale for imposing the burden:

> "It is clear . . . that when the federal courts sit as the initial forum for any prisoner who alleges a deprivation of his constitutional rights, an allegation often totally without merit, a tremendous amount of court time is required to dispose of the action." *McCray v. Burrell*, *supra*, 367 F. Supp. at 1195.

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[25] In *Ex parte Hull*, the Court held unconstitutional a practice of prison officials which required that all petitions and complaints by prisoners be "screened" before being submitted to the courts. This Court has since found other impediments to access to be unconstitutional. See, e.g., *Johnson v. Avery*, 393 U.S. 483 (1969), prohibition against prisoners assisting one another in preparing court documents; *Procunier v. Martinez*, *supra*, bar against law students and paraprofessionals assisting prisoners.

[26] The discrimination at issue in this case came as the result of federal court action; therefore, the Fifth Amendment rather than the Fourteenth Amendment is applicable. See, *Schneider v. Rusk*, 377 U.S. 163, 168 (1964).

[27] See, *Frontiero v. Richardson*, 411 U.S. 677 (1973).

Putting aside for the moment the vitality of the assumptions involved here, and the efficacy of the proposed cure, the question is whether judicial efficiency is a "compelling" reason in the constitutional sense for restricting prisoner access to the federal courts. A short response is available: ". . . [A]dministrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law." (footnote omitted). *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 647 (1974). And, as the Court stated in *Frontiero v. Richardson, supra* at 690:

> In any case, our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656, 31 L.Ed.2d 551, 92 S.Ct 1208 (1972). And when we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality. See *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct 1322 (1969); *Carrington v. Rash*, 380 U.S. 89, 13 L.Ed.2d 675, 85 S.Ct 775 (1965).

In his separate opinion below, Judge Widener suggested two arguments to support his view that prisoners should be required to exhaust state remedies in §1983 cases. First, he posited that this Court's decision in *Wolff v. McDonnell, supra*, held that "the rights of a state prisoner under § 1983 are not coextensive with those of any other person," and that *Wolff* "created a separate class for prisoners." 516 F.2d at 376. It is quite true that this Court found in *Wolff*, as it did in *Pell v. Procunier*, 417 U.S. 817 (1974), and *Procunier v. Martinez, supra*, that the interests of prisoners under the Constitution must be

balanced against the legitimate and identifiable state interests in prison administration, but this is not a unique analysis,[28] and it does not mean that prisoners, as a class, may be treated differently from all other civil rights litigants with regard to the availability of the federal courts as the principal protector of constitutional rights.

Second, Judge Widener suggested a kind of reverse equal protection analysis, which would work to the detriment of prisoners who have proper §1983 claims, when he suggested that since exhaustion is required in habeas corpus cases, where liberty may be at stake, exhaustion should also be required in §1983 cases where the challenge is to conditions of confinement. Under this analysis, prisoners again would be subjected to a restriction on their right to access to the courts which is applicable to no other §1983 plaintiff. This Court rejected such a result in *Preiser v. Rodriguez, supra*, where it discussed the comity considerations which underly an exhaustion rule, in the prison context, and concluded that the demands of federalism do not require prisoners to exhaust state remedies in cases challenging the conditions of confinement.

Respondents do not mean to derogate the value of and benefits to be derived from wise judicial management, but the pursuit of efficiency cannot be permitted to

[28] See, e.g., *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969) (public high school); *Healy v. James*, 408 U.S. 169 (1972) (college); *United States v. O'Brien*, 391 U.S. 367 (1968) (military).

contravene the fundamental constitutional rights of any class of citizens.[28a]

D. A Requirement That Prisoners Exhaust A State Administrative Remedy In §1983 Cases Will Not Result In Any Real Benefits To The Federal Courts.

The decisions of the District Court below were premised, in part, on the assumption that requiring Maryland prisoners to petition the Inmate Grievance Commission for relief before filing actions under 42 U.S.C. §1983 would alleviate the burden which prisoner complaints were perceived to be on the federal courts. See, *McCray v. Burrell*, 367 F. Supp. at 1193, 1201; *Washington v. Boslow*, 375 F. Supp. at 1303-04. An exhaustion requirement, however, will not bring about any substantial

[28a]Petitioners argue that the Maryland courts have always been willing to adjust state law to conform to constitutional decisions, and that Maryland is sensitive to the constitutional rights of state prisoners. (Pet. Br. at 70). Petitioners conclude that with an exhaustion requirement in §1983 cases to assist them, they will have the "tools to finish the job." (*Id.* at 91). Respondents have been unable to discover any Maryland appellate decision which affords relief to a prisoner in a case concerning the conditions of confinement. See, *Wilwording v. Swenson*, 404 U.S. at 250. In *State v. McCray*, 267 Md. 111, 129-134 (1972), the Court of Appeals catalogued all of the cases in which prisoners have been denied relief and concluded: "The short of it is that in this State the courts have steadfastly refused to review the complaints of persons confined in Patuxent and the various penal institutions, for the reason that the redress of grievances of the inmates was for the executive branch of the government." See also, *Hopkins v. McClellan*, ____ F. Supp. ____, 18 Cr.L. 2318 (D. Md., 12/11/75), where the district court had to compel Maryland prison officials to obey the clear mandate of this Court's decision in *Procunier v. Martinez*, *supra*.

benefits in terms of reducing the number of actions filed, screening out frivolous complaints or increasing the efficiency with which the federal courts can manage prisoner cases.

Respondents recognize that the number of petitions and complaints filed by state prisoners in the federal courts has increased during the past several years. Prisoner cases, however, should not be made the "scapegoat" for problems which are largely beyond the control of the litigants and the courts.[29] There has been a dramatic rise in all filings, particularly bankruptcies, for example, and the possible unnecessary involvement of the federal courts in diversity cases has also expanded the judicial work load.[30]

The courts can efficiently manage prisoner complaints by using the several means which are already available.[31] In addition, the litigation of a civil rights action often involves the expenditure of a relatively small amount of judicial resources.[32]

During the fiscal year ended June 30, 1972, in the United States District Courts, there were a total of 2877 state prisoner civil rights actions terminated of which 2644 were disposed of before pretrial and of which 97 (3.4%) reached trial. *Report of the Director of the*

[29]It is to be expected that the explosion in prison populations, for example, has a proportionate effect on the number of prisoner grievances.

[30]See, footnote 48 and text, *infra*.

[31]See, Respondents' Brief, Part II.E., *infra*.

[32]It has been found that "most of the successful section 1983 cases present simple fact situations with a clear issue of federal law requiring limited, if any, evidentiary hearings." Chevigny, *supra*, at 1354. Also see McCormack, *The Expansion of Federal Question Jurisdiction and the Prisoner Complaint Caseload*, 2 Wis. L. Rev. 523 (1975).

Administrative Office of the United States Courts (1972) at A-23. The following year, 3500 such actions were terminated of which 3213 were disposed of before pretrial and of which 173 (4.9%) reached trial. *Report* (1973) at A-23.

In the District of Maryland during the fiscal year ended June 30, 1972, a total of 1756 civil cases (omitting land condemnation cases) were terminated of which 6.2% reached trial. *Report* (1972) at A-24. In the Fourth Circuit, 9.3% of a total of 8304 cases terminated were tried. *Id.*

During the next fiscal year, the figures were as follows:

	Total Civil Cases Terminated	Per Cent Tried
District of Maryland	1616	7.9%
Fourth Circuit	8509	9.8%

Report (1973) at A-24.

To summarize, during 1972 and 1973, of the total state prisoner civil rights actions terminated in the district courts, 3.4% and 4.9%, respectively, reached trial. By comparison, for the District Courts in the Fourth Circuit, during 1972 and 1973, of all civil cases terminated, 9.3% and 9.8%, respectively, were tried. It is therefore apparent that less than 5% of state prisoner civil rights cases require evidentiary hearings,[33] and the burden of evidentiary hearings in prisoner civil rights cases is significantly less than in all other civil cases.

[33] In *Wingo v. Wedding*, 418 U.S. 461, 473 n.20 (1974), this Court referred to statistics in the *Report of the Director of the Administrative Office of the United States Courts* (1973) which indicate that "[i]n 1973, of the 10,800 prisoner petitions filed for habeas corpus or as §2255 motions to vacate sentence, less than 5%, or approximately 530, necessitated evidentiary hearings." The Court concluded, therefore, that "... it does not appear that judges will be significantly overburdened by the requirement that they personally conduct evidentiary hearings."

There are means available to reduce the workload of the federal courts without imposing an exhaustion rule on state prisoners,[34] and as Respondents point out, *infra*, the role of the courts in defining the rights and responsibilities of prisoners and prison officials, and any efforts of the states to create grievance mechanisms to which prisoners will resort voluntarily, will have the natural effect of reducing the amount of prisoner litigation.

The District Court stated recurrently in the decisions below that prisoner actions are often frivolous. See e.g., *McCray v. Burrell*, 367 F. Supp. at 1195, 1201; *Washington v. Boslow*, 375 F. Supp. at 1300.[35] The Court argued that "if there is available a viable administrative remedy, then the spurious claims will be weeded out, and the district courts will be called upon to hear only those cases that are clearly of constitutional dimension." *McCray v. Burrell, supra* at 1201. An exhaustion requirement, however, will not achieve that desirable result.

Petitioners indicate that during the period from July 1, 1971 through June 30, 1974, of the 1680 complaints received by the Inmate Grievance Commission, only 191 (11.4%) were found to be meritorious by the Commis-

[34] For example, the number of federal judges can be increased. See, Chief Justice Burger's Year-End Report on the Condition of the Judiciary, *infra*, n. 48. See also, *Rodriguez v. McGinnis, supra* at 81-82, Judge Smith, concurring.

[35] Compare, *Rodriguez v. McGinnis, supra* at 84, Judge Oakes, concurring: "It is not my impression that the federal courts are being overwhelmed with frivolous prisoners' petitions–indeed, many have been highly meritorious." "Although many of the prisoner claims are frivolous, some raise constitutional issues of great difficulty and importance. These seem clearly to merit the attention of the federal judiciary. [footnote omitted]. Federal judicial attention to these constitutional issues over the course of the past decade has had a profound effect upon prison management and prison life. Viewed in this perspective, the prisoner rights cases aggregately have great significance both for the individual inmate and for the correctional system generally." Remington, *State Prisoner Litigation and the Federal Courts*, 1974 Arizona St. L.J. 549, 551.

sion.[36] (Pet. Br. at 89). Presumably, many complainants whose cases are dismissed or found to be without merit by the Commission will file their grievances in federal court.[37] In addition, because the Commission has no authority to award damages, it is an inadequate state remedy in cases where damages are sought as relief, and all such cases will proceed to the federal court.[38]

The District Court suggested that the Grievance Commission will screen out the claims that are clearly of constitutional dimension for the District Court. Whether this state agency can be relied upon to identify constitutional issues or to understand and apply federal law,

[36] It is unclear how many of these 191 decisions were subsequently reversed by the Secretary of the Maryland Department of Public Safety and Correctional Services under the statutory authority granted the Secretary to review the Commission's decisions. See Article 41, §204F(f)(2). Similarly, there is no way to determine whether the relief granted in the 191 cases was sufficiently responsive to the prisoners' requests to make continuation of the cases in the federal court unnecessary.

[37] It is possible an exhaustion requirement will have the opposite effect from that which was anticipated by Chief Judge Northrop. It may be that the Commission will "weed out" the valid claims, where it has the authority to grant relief, but the "spurious" claims will continue to "flood" the District Court.

[38] The Commission does not even have the authority or jurisdiction to award compensation to a prisoner who alleges that his personal property was lost or stolen as the result of the negligence or intentional conduct of prison officials. See, *Lee Avon Johnson, et al. v. Robert J. Lally*, No. 9934 Law. Docket 16 (Cir. Ct. for Wash. Cnty. Md., 1/28/76). Resp. Br., Addendum A. Lost property cases represent 13% of the Commission's total caseload (Pet. Br. at 42), but in view of the *Johnson* decision, all such cases may be filed in federal court without an exhaustion requirement since the state remedy is inadequate. These minor prisoner grievances, which are similar to the case concerning the missing seven packs of cigarettes to which reference was made by Chief Justice Burger in his Report on the Federal Judicial Branch, delivered before the ABA (8/6/73), are beyond the jurisdiction of the Commission.

however, is highly questionable.[39] These tasks are the responsibility of the federal judges to which their expertise is uniquely suited.[40]

In short, the Commission will not significantly reduce the number of federal actions filed or effectively insure that those actions which are filed are of constitutional dimension. The only conceivable efficiency which would seem to follow from an exhaustion rule is that some prisoners may become literally exhausted by the duplicative and tortuous requirement of pursuing relief through the Grievance Commission and forfeit their federal remedy altogether.

Another benefit which the District Court perceived as attending an exhaustion requirement for Maryland prisoners was that having petitioned the Inmate Grievance Commission, a prisoner would come to the federal court with the issue of liability clearly defined on the record. *McCray v. Burrell, supra* at 1210. Furthermore, the court could then "readily dispose of the litigation in the same manner in which it now handles habeas corpus petitions." *Id.* In *Washington v. Boslow, supra* at 1302, the Court

[39] Mr. Justice Frankfurter, in *Brown v. Allen*, 344 U.S. 433, 501-02 (1953), raised the issue of the difficulty which the federal courts have in finding constitutional claims in poorly presented petitions.

[40] Under the Inmate Grievance Commission statute (Article 41, §204F(e), and in practice, when complaints are received from prisoners, they are subjected to a preliminary review by the Executive Director (App. 283-295), and if upon such review, a complaint is determined to be on its face wholly lacking in merit, it may be dismissed without a hearing or specific findings of fact. Approximately 55% of the grievances received are dismissed in this manner. (Pet. Br. at 89). The Executive Director exercises the preliminary review power, but in his deposition, he was unable to articulate any standards which he uses for review. See also, Pet. Br. at 28-29.

went on to add that ". . . the state procedure would sharpen the issues and furnish a record which, if necessary, could be supplemented in this United States District Court on the damage claim." The purpose of the Commission record would be to serve as a preliminary indicator of the validity of a claim, to expedite cases by alerting the Court to those cases in which constitutional deprivations are likely to have occurred and by moving them into the regular trial calendar, and to be employed by the Court to arrive at the central issues for trial, thereby significantly reducing the trial time involved. *Id.* at 1300.

The Grievance Commission record, however, cannot be used by the federal court to serve these purposes or to dispose of civil rights in the same manner in which habeas corpus petitions are handled, as Chief Judge Northrop has suggested.[41] There is serious doubt whether a district court, vested with original jurisdiction over civil rights complaints, may make use of the record developed by a state administrative agency or the decision of that agency, in deciding a civil rights case properly brought before it.

The District Court's decision is so unique in this regard, *inter alia*, that there is little, if any, law on the question of whether, or to what extent, it is permissible to use a state administrative record in a §1983 case. Several principles are clear, however. First, an analogy to habeas corpus petitions is inappropriate because in those cases, Congress has explicitly authorized the federal courts to presume that a determination made by a state court is correct unless a showing can be made to the contrary.[42] The presumption specifically applied only to

[41] As a preliminary matter, it is clear that there would not be many records for submission to the District Court since only about 44% of the complaints filed with the Commission go to a hearing. (Pet. Br. at 89).

[42] See, 28 U.S.C. §2254(d). Cf., *Townsend v. Sain*, 372 U.S. 293 (1963).

state court proceedings,[43] and the standard of review is less restrictive than that which is used in judicial review of administrative agency decisions.[44]

Second, the findings of the Inmate Grievance Commission would be of little use in a subsequent §1983 action. As the District Court conceded, "a determination of the Grievance Commission or the state courts on the merits of a prisoner's claim is not binding on this Court. . . ." *Washington v. Boslow*, 375 F. Supp. at 1300. Principles of *res judicata* and collateral estoppel do not operate in a §1983 case to bar an Article III court from making its own determination of facts and adjudication of rights of the parties where the prior decision was by a state administrative agency. See, *Lombard v. Board of Education*, 502 F.2d 631, 635-37 (2nd Cir. 1974), cert. denied 420 U.S. 976 (1975). See also, *Wageed v. Schenuit*, ____ F. Supp. ____, 44 L.W. 2307 (D. Md., 12/11/75) (no *res judicata* effect to a state administrative agency determination in a subsequent action under 42 U.S.C. §1981).[45] It would appear, in fact, that a §1983 litigant raising constitutional claims is entitled to a *de novo* hearing by

[43] 28 U.S.C. §2254(d). See also, *Townsend v. Sain, supra* at 314-15, where the Court relied on "the coequal responsibilities of state and federal *judges* in the administration of federal constitutional law" (emphasis added) in establishing the federal review standards.

[44] Compare, e.g., the habeas standard set by the Court, "fairly supported by the record as a whole" with the APA standard, "unsupported by *substantial* evidence." *Townsend, supra*, 372 U.S. at 313; 5 U.S.C. §706(2)(e).

[45] The rules of collateral estoppel and *res judicata* are particularly inappropriate in this case because in Maryland, hearsay evidence may be the sole basis for the decision of an administrative agency. See, *Fairchild Hiller Corp. v. Supervisor of Assessments*, 267 Md. 519, 523 (1973).

the federal court.[46] *Cf., Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920). In *Holiday v. Johnson*, 313 U.S. 342 (1941), this Court held that under the federal Habeas Corpus Act, a federal judge, and not a commissioner, must make *de novo* findings of fact and conclusions of law in a prisoner habeas corpus case. See, *Id.* at 352, 353-54. In *Wingo v. Wedding, supra*, the Court specifically rejected the argument that reference to a magistrate was dictated by court congestion, thereby reaffirming the necessity of an original hearing by a federal judge.[47]

To summarize, it appears that the anticipated efficiencies upon which the District Court predicated its decisions to require exhaustion are largely illusory:

1. An exhaustion rule will not substantially reduce the total number of cases filed in the Maryland federal court unless the rule itself poses such a barrier to prisoners that they are coerced by it into forfeiting their federal remedy.

2. The Inmate Grievance Commission will not significantly assist in accomplishing the desired result of assuring that the only cases filed in federal court are of constitutional dimension.

3. The record or findings of fact, if any, of Inmate Grievance Commission proceedings will not be useful to the federal court in the management or litigation of prisoner civil rights actions.

[46] Whatever may be the limitations on a district court judge in using the record or findings of a state administrative agency, it is clear that such materials could not be used where the litigants were entitled to a trial by jury. See, *Dairy Queen v. Wood, supra* at 472-73; *Ross v. Bernhard, supra; Tights, Inc. v. Stanley*, 441 F.2d 336, 337 (4th Cir. 1971). The District Court recognized that if there is a right to a jury trial, a prior resort to the Inmate Grievance Commission will not prejudice the right: "These administrative proceedings will not estop the plaintiff from having those issues appropriate for jury resolution fully tried before a jury." *Washington v. Boslow, supra* at 1300-01.

[47] In *LaBuy v. Howes Leather*, 352 U.S. 249 (1957), this Court refused to sanction the referral of a federal claim to a special master where the referral was made because of the congested court docket.

E. An Exhaustion Requirement For Prisoner Civil Rights Actions Is Unnecessary In Light Of The Availability Of Meaningful Alternatives Which More Effectively Serve The Interests Of The Parties And The Federal Courts.

The enormous workload of the federal courts is a reality that cannot be ignored, and about a sixth of the cases on the civil dockets of federal courts are petitions from prisoners.[48] It is therefore understandable that Chief Judge Northrop would like the Inmate Grievance Commission to be the answer to at least some of the litigation filed in the Maryland District Court.[49] There

[48] See Chief Justice Burger's Year-End Report, *The Condition of the Judiciary* (January 3, 1976).

[49] Prisoner litigation, of course, is not the only, or even the most significant, cause of the increased court work. Bankruptcies, for example, rose 34.3% in fiscal 1975, leaving 262, 282 such cases awaiting decision at the end of the year, and diversity cases represent nearly 20% of the District Court caseload. *Id.* Further, as Chief Judge Northrop has recently announced, *all* civil filings in the District of Maryland have increased 27% since 1974, while bankruptcy filings have increased 61% and criminal proceedings, 14%. In terms of the amount of time consumed by the different types of cases processed, the "multi-party, complex antitrust and patent litigation," in combination with the protracted trials of multi-count, multi-defendant "white collar" offenses appear to shadow all other matters. Address of the Honorable Edward S. Northrop, Chief Judge, U.S. D. Md., at the Mid-Winter Meeting of the Maryland Bar Association, January 9, 1976. *The Daily Record, Baltimore*, January 12, 1976.

are effective means, however, by which the federal courts can handle prisoner cases without resorting to the drastic action of requiring the plaintiffs to exhaust state remedies.

The decisions by this Court and the lower federal courts have already decided many of the constitutional issues which typically arise between prisoners and prison officials.[50] In *Procunier v. Martinez*, 416 U.S. 396, 407 (1974) for example, the Court formulated a standard of review for prisoner mail censorship in order to reduce repetitive, piecemeal litigation by prisoners and to make it unnecessary for federal courts to be perpetually involved in the affairs of prison administration. See also, *Wolff v. McDonnell, supra; Pell v. Procunier*, 417 U.S. 817 (1974). There is reason to believe that " 'the development of clear cut codes of prisoners' rights and responsibilities [will] also serve to eliminate many grievances before they [arise], and to stop prison officials from violating what should be uncontested rights.' " Coulson, *Justice Behind Bars: Time to Arbitrate*, ABA Journal, June, 1973, quoting from an address by Judge Weinstein. More specifically, the Eighth Circuit recently issued the following admonition:

> With the definitive guidelines of minimal due process requirements now set forth in *Wolff v. McDonnell* (citation omitted), the claims concerning denial of procedural due process in prison disciplinaries should now disappear. We assume all prison authorities will establish disciplinary procedures meeting at least the basic requirements set forth there. *Willis v. Ciccone*, 506 F.2d 1011, 1017 n. 6 (1974).[51]

[50] An important effect of the decision in *Preiser v. Rodriguez, supra*, will be to substantially reduce the number of constitutional claims which prisoners may litigate under 42 U.S.C. §1983. See, *Schneckloth v. Bustamonte*, 412 U.S. 218, 260 n. 14 (1973), Mr. Justice Powell, concurring. This has a significant impact on the courts' work because "a very high percentage of the habeas corpus petitions can be, and are, disposed of on the face of the petition or after submission of a paper record." *Rodriguez v. McGinnis, supra* at 86, dissenting opinion.

A number of useful approaches to handling civil rights actions filed by prisoners have been developed and adopted by the federal courts and suggested by commentators. The Judicial Commission on §1983 of the Federal Judicial Center, for example, has proposed several procedures which the District Courts may use in prisoner cases: (1) a centralized "writs desk" for prisoner petitions with an initial review and recommendation by a magistrate;[52] (2) the use of specific complaint forms designed to elicit sufficient information from a prisoner to determine the substantiality of the complaint; (3) dismissing *sua sponte* frivolous complaints where amendments would be futile; (4) the expanded use of magistrates; (5) a requirement that defendant prison officials file "special answers" which would require the officials to investigate and evaluate the prisoner's complaint in a report to the court. Remington, *State Prisoner Litigation and the Federal Courts*, Ariz. St. L. J. 549 (1974).[53]

[51] Petitioners indicate that the greatest number (36%) of complaints received from Maryland prisoners by the Inmate Grievance Commission are challenges to adjustment team decisions. The relief sought in virtually all of those cases includes restoration of good time taken away as a disciplinary measure. See, e.g., *Bundy v. Cannon*, 328 F. Supp. 165, 167, 175, 177 (D. Md. 1971). Under *Preiser v. Rodriguez, supra*, therefore, exhaustion of state remedies is already required in perhaps a third of the potential constitutional complaints by Maryland prisoners.

[52] See, in support, *Mathews v. Weber*, ____ U.S. ____, 44 L.W. 4065 (1/13/76).

[53] The Fifth Circuit has commented favorably upon the use of a "special report" to be filed by state prison officials to assist the district court in determining whether there is a factual basis for the allegations in *pro se* prisoner complaints. *Hardwick v. Ault*, 517 F.2d 295 (5th Cir. 1975). See also, *Watson v. Ault*, 525 F.2d 886, 892 n. 7 (5th Cir. 1976).

The Federal Rules of Civil Procedure provide for other methods which can be used to clarify the issues in a case and to separate cases which are frivolous or do not concern denials of federal constitutional rights from complaints which do raise issues of a constitutional dimension. Rule 16, for example, encourages pre-trial conferences.[54] In addition, the defendants may institute discovery proceedings, Rules 26-37, and they may, or be required by the court to, move for a more definite statement of the prisoner's allegations. Rule 12(e). These approaches were suggested in *Reed v. Jones*, 483 F.2d 77, 79 (5th Cir. 1973). The Federal Magistrates Act specifically authorizes a district court to assign U.S. Magistrates the duty of assisting a federal judge in the conduct of pretrial or discovery proceedings in a civil action. 28 U.S.C. §636(b)(2).[55]

The appointment of counsel for indigent persons is perhaps the most effective means of assuring that cases are properly and efficiently litigated, and the district courts may request attorneys to represent prisoners who have been permitted to proceed *in forma pauperis*. See, 28 U.S.C. §1915(d).[56] In addition, the courts can assign law students to investigate and evaluate prisoner claims under the "inherent power to . . . appoint persons unconnected with the court to aid judges in the performance of their judicial duties, as they may arise in the progress of a

[54] See also, Rule 35, Rules of the U.S. District Court for the District of Maryland. Respondents' Brief, Addendum B.

[55] This is one of the suggestions advanced by Mr. Chief Justice Burger to deal with prisoner petitions. Burger, *Report on the Federal Judicial Branch*, Delivered before the American Bar Association, Washington, D.C. August 6, 1973, at 10.

[56] Counsel may also be appointed in an *amicus* capacity. See, *Brown v. Allen*, 344 U.S. 433, 502 (1953), separate opinion of Mr. Justice Frankfurter.

cause." *In re Peterson*, 253 U.S. 300, 312 (1920). Other means of producing more information for the court about a cause of action, without appointing attorneys or law students in adversary or investigatory capacities, include the "amplification" procedure which is used in at least two circuits in 28 U.S.C. §2255 cases,[57] and the employment of a questionnaire, such as the form recommended by the Federal Judicial Center Committee, by which the court can develop the factual basis for a prisoner's complaint and determine whether a prisoner is abusing the judicial process by multiple filings. See, *Watson v. Ault, supra* at 892 n.6 and appendix.

It is also proper to consider what means are available to the various state prison systems which could be employed to assist the federal courts in managing prisoner cases. In *Younger v. Gilmore*, 404 U.S. 15 (1971), the Supreme Court established the importance of prison law libraries as a basic means of assisting prisoners in obtaining their constitutional right to access to the courts. A program in which prisoners are trained to work in the libraries as "jailhouse lawyers" is an effective means of providing legal assistance to other prisoners. See, Wexler, *The Jailhouse Lawyer as a Paraprofessional: Problems and Prospects*. 7 Crim. L. Bull. 139-56 (1971); *Inmate Involvement in Prison Legal Services*, ABA Commission on Correctional Facilities and Services (1974). A system of prison law libraries, thoughtfully planned, organized and implemented, properly supervised and utilized, and staffed by prisoner paralegals, law students and perhaps attorneys, is not only an effective means for indigent and uneducated prisoners to obtain meaningful

[57] See, *United States v. Simpson*, 436 F.2d 162 (D.C. Cir. 1970); *Raines v. United States*, 423 F.2d 526, 529-30 (4th Cir. 1970).

access to the courts, but also would result in prisoners filing non-frivolous cases, in proper form, that could be efficiently managed by the federal courts. The provision of legal services for prisoners

> . . . would help eliminate frivolous claims or those which could be easily adjusted administratively. Further, petitions drawn with the assistance of counsel would be clearer and more to the point and would help assure that the relief sought falls within the framework of existing rights and remedies. Coulson, *Id.*[58]

Petitioners assert, without any evidence to support their claim, that "it is certainly a naive view of the realities of prison life" to expect that Maryland prisoners will voluntarily resort to the Inmate Grievance Commission unless they are compelled to do so under an exhaustion requirement. Petitioners' Brief, p. 75.[59] The problem lies not with the prisoners, however, but with

[58] See also, Lesnick, *Grievance Procedures in Federal Prisons*, 123 U. Pa. L. Rev. 1 (Nov. 1974), discussing the expanding use of law students and prisoner paralegals to provide legal assistance for prisoners; *Unites States v. Simpson*, *supra* at 167-170, encouraging the development of prisoner legal services programs staffed by law students.

[59] Petitioners position is contradictory in that they claim the Commission is such an adequate State remedy that an exhaustion rule should be imposed on Maryland prisoners, while admitting at the same time, that the Commission has been so ineffective that prisoners will not voluntarily petition it. The correct view is that

> "... it may well benefit prisoners to seek administrative relief first since this may be both a more expeditious and advantageous source of relief from unlawful action. Nevertheless, where a prisoner utilizes §1983 as the means to attack the conditions of his confinement, the very nature of the suit and the rules governing its procedure remove it from any judicial requirement of exhaustion. See *Preiser v. Rodriguez*, [*supra*]. (citation omitted). *Willis v. Ciccone*, *supra* at 1015 n. 3.

the Commission. A fundamental principle upon which all commentators in the field of prisoner grievance arbitration agree is that for a grievance mechanism to be perceived as fair and to gain acceptance by prisoners, it must provide for genuine prisoner input beyond the filing of a complaint or request for relief.[60] The Maryland grievance mechanism functions on the assumption that working with prisoners to resolve their problems constitutes giving them something they do not deserve, and that the proper approach is to relent only when a prisoner can prove in an adversary proceeding that he is entitled to relief. Respondents, therefore, must restate the obvious:

> . . . those who are allowed a voice in the decision-making process are more likely to obey such rules. . . . Inmate participation does not contemplate the removal of authority from prison administrators; it only provides a means by which the inmates can feel that, and it would actually be that, they are to some degree still responsible for their futures. S. Car. Department of Corrections. *The Emerging*

[60] See, Lesnick, *supra* at 37. See also, e.g., *Preventive Mediation in Corrections*, "Conflict" (quarterly publication of the Institute of Mediation and Conflict), 11/74; *Grievance Arbitration in Prison: Holton Experiment*, Resolution of Correctional Problems and Issues, Spring, 1975; National Council on Crime and Delinquency, *Peaceful Resolution of Prison Conflict*, 1973; Note, *Bargaining in Correctional Institutions: Restructuring the Relationship Between the Inmate and the Prison Community*, 81 Yale L.J. 726 (1972).

Rights of the Confined, 94 (1973). Also see, Corrections Magazine, Jan./Feb. 1975, passim.[60a]

To summarize, it is apparent that there are a variety of measures available to the federal courts and the state prison systems which will serve to resolve the difficulties the courts encounter in managing prisoner civil rights actions and which will permit the prison systems to correct their own errors without unnecessary federal court intervention. The interests of the states and the courts, therefore, can be fully served without imposing a rule of exhaustion on state prisoners in proper §1983 cases.

[60a]The recent proliferation of prisoner grievance mechanisms in the various state prison systems (See, Pet. for Cert. at 10 n. 3) has occurred despite the settled law which precludes an exhaustion requirement for prisoners in cases properly brought under §1983. See, "Prison Grievance Procedures: A National Survey of Programs Underway," *Corrections Magazine*, January/February, 1975. Grievance procedures, such as the Maryland Inmate Grievance Commission, have developed because state prison officials perceive the need for such mechanisms in the proper administration of their prison systems. Petitioners offer no empirical support for their claim that the decision below will in any way adversely affect the progress which is being made in this area. In fact, it would appear that the no-exhaustion rule in §1983 cases has a beneficial effect on the development of grievance procedures. The availability of federal court relief for prisoners is an incentive for the states to provide grievance procedures which act promptly and fairly. If a state grievance mechanism is visible and has simple, workable procedures, and if prisoners believe that they will have a fair opportunity to present their claims to an agency which will provide relief, where appropriate, in a reasonable period of time, many potential *pro se* litigants in federal court would avail themselves voluntarily of such a procedure rather than engage in difficult and protracted litigation.

F. This Court's Decision In *Gibson v. Berryhill*, 411 U.S. 564 (1973) Does Not Suggest An Exception To The No-Exhaustion Rule In §1983 Actions Which Is Applicable To This Case

The Supreme Court's decision in *Gibson v. Berryhill*, 411 U.S. 564 (1973), apparently leaves unresolved the question of whether the exhaustion of state administrative remedies may be required in a §1983 action where the state remedy was initiated and pending, and the individual would be deprived of nothing until completion of the state proceeding. See, *Brooks v. Center Township*, 485 F.2d 383, 386 (7th Cir. 1973). The Court of Appeals for the Fourth Circuit implicitly recognized the appropriateness of an exhaustion of state administrative remedies requirement, even in a §1983 action, under such limited circumstances in *Acanfora v. Board of Education of Montgomery County*, 491 F.2d 498 n.2 (4th Cir. 1974), cert. denied 419 U.S. 836 (1974), but it rejected Petitiones' argument that *Gibson v. Berryhill* supports an exhaustion requirement in the present case. *McCray v. Burrell*, 516 F.2d 357, 364 (4th Cir. 1975).

The nature of the possible "*Gibson v. Berryhill* exception" to the general rule that claims under §1983 are not subject to an exhaustion of state administrative remedies rule has been described in various terms. In *Toney v. Reagan*, 467 F.2d 953, 956 (9th Cir. 1972), cert. denied, 409 U.S. 1130 (1973), for example, while recognizing the principle established by *Monroe v. Pape*, *McNeese v. Board of Education*, *Damico v. California*, *Houghton v. Shafer* and *Wilwording v. Swenson*, the Court held that "*prospective*, as distinguished from *retrospective*, state administrative remedies must be exhausted in order to

state a claim upon which relief can be granted under the Civil Rights Acts." (emphasis added).

The plaintiffs, who were nontenured professors at Fresno State College in California, were notified in November, 1970, that they would not be reemployed in the fall of 1971, and at that time, "the alleged injury to their constitutional rights was not yet consummated." *Id.* The court found that

> [t]he grievance procedures in this case would not operate to rectify a wrong which had already occurred. Rather, they were a means of forestalling a threatened deprivation of rights which was not to transpire for several months. In the event that appellants were to utilize the state hearing procedures, they might successfully reverse the decision not to reemploy them, have their contracts renewed, and suffer no break in their employment. *Id.*

The rationale for an exhaustion requirement under such circumstances can also be defined in terms of "ripeness" and "finality" of agency action. As Professor LaFrance has indicated, courts will determine whether an agency action is ripe for adjudication by looking "to the nature of the action challenged, and more particularly to the impact on the parties." LaFrance, *Federal Litigation For the Poor*, Law and Social Order, Arizona St. Univ. L.J. 33 (1972).

> The concept of finality, then, does not require that the administrative process have run its entire course, but only that there exists an agency event which affects asserted interests in a definable way. Delay itself may be a reviewable 'action', even though an administrator is still weighing policy factors preliminary to a result. Particularly is this true of a request for interim relief. [citations and footnotes omitted] *Id.* Also see *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (U.S. App. D.C. 1970).

The Court of Appeals for the Fifth Circuit would require the exhaustion of adequate state administrative remedies only to the extent necessary to assure that a Civil Rights Act claim is "ripe for adjudication," *Polk v. State Bar of Texas*, 480 F.2d 998, 1003 (5th Cir. 1973), or "final from the institutional viewpoint." *Stevenson v. Board of Education of Wheeler County, Georgia*, 426 F.2d 1154, 1157 (5th Cir. 1970), cert. denied, 400 U.S. 957, 91 S.Ct. 355 (1970). Similarly, in *Raper v. Lucey*, 488 F.2d 748, 751 n.3 (1st Cir. 1973), a civil rights action brought by an applicant for a Massachusetts motor vehicle license alleging that the state handling of license applications violates the Due Process Clause, the Court acknowledged and accepted the principle that the requirement of exhaustion of available and adequate state administrative remedies is unnecessary in §1983 cases, "[b]ut we adhere to our view of the necessity for ripeness to the extent that there must be at least some definitive administrative or institutional determination before a §1983 action may arise."[61]

The court below correctly concluded that the language in *Gibson v. Berryhill, supra* at 574-75, relied on by Petitioners (Pet. Br. at 65), does not suggest that exhaustion may be required of Respondents.

> At most, the statement is a mere introduction to an alternative ground of decision; but, more importantly, it relates to facts quite dissimilar from those in the instant cases. *Gibson* proceeds on the premise that "the individual charged is to be deprived of nothing until the completion of [the state adminis-

[61] Petitioner's reliance on *U.A.W. v. State Farm Mutual Automobile Insurance Company*, 350 F. Supp. 522 (N.D. Ill. 1972), is misplaced. The decision in *U.A.W. v. State Farm* relied primarily on *Metcalf v. Swank*, 444 F.2d 1353 (7th Cir. 1971), which was subsequently reversed by the Supreme Court in light of *Carter v. Stanton*, 405 U.S. 669 (1972). See, 406 U.S. 914 (1972).

> trative] proceeding"—in short, in *Gibson* the possible harm was *in futuro*. *Gibson*, therefore, is unlike the instant cases where the alleged deprivation of civil right has occurred and may be continuing. . . . The rationale of this distinction—which we need not adopt or reject to decide the cases before us—is that exhaustion may be necessary only when it assures that a decision of state officials depriving plaintiff of a civil right is final, so that the case is ripe for adjudication. (citation omitted; brackets in original).[62]

The rationale of *Gibson v. Berryhill* does not permit a requirement that a Maryland state prisoner seek relief from the Inmate Grievance Commission before being allowed to bring his constitutional claims to federal court. The Commission is a "retrospective" rather than a "prospective" administrative remedy.[63] It is a forum in which a prisoner who has been injured or deprived of something by prison officials may air his or her grievance. The Commission is not an administrative body which decides if a person will be subjected to some loss or injury but rather, its function is to decide whether a

[62] *Cf., Blanton v. State University of New York*, 489 F.2d 377, 383 (2nd Cir. 1973).

[63] Petitioners concede this (Pet. Br. at 65) but claim without explanation, that the Commission has the "capability" to be a prospective remedy. Respondents perceive no way in which the Commission is, or has the capability under the present Maryland statute (Article 41 §204F) and practice to be, a prospective remedy. The State's position here, as throughout its other arguments, appears to be that the Commission is an adequate remedy, and therefore, it must be exhausted. This is a "bootstrap" argument, of course, and overlooks the fact that a rule of exhaustion, if any, is "rooted in considerations of federal-state comity," *Preiser v. Rodriguez*, *supra* at 491, and not on whether a particular state remedy is adequate or available.

person who has already been injured or caused to suffer some deprivation is entitled to relief.[64]

The present cases do not concern injuries which Respondents expect to suffer in the future. Respondents' complaints are based on the past acts of Maryland prison officials for which the Inmate Grievance Commission cannot provide a remedy. McCray was twice placed into isolated confinement. Washington suffered injuries from being refused medical treatment. Stokes suffered violations of his First and Fourteenth Amendment rights when he was arbitrarily prohibited from receiving and reading specific political publications. Petitioners' desire for an exhaustion requirement to resolve future disputes is therefore inopposite. As this Court stated in the context of a desegregation case:

> The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now, and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled. *Watson v. City of Memphis*, 373 U.S. 526, 533 (1963).

Also see, *Pacific Telephone & Telegraph Co. v. Kuzkendahl*, 265 U.S. 196 (1924); *Oklahoma Gas Co. v. Russell*, 261 U.S. 290 (1923); Jaffe, *Judicial Control of Administrative Action*, 429 (1965).

[64] In fact, the Inmate Grievance Commission statute requires that a grievance be ripe for adjudication and be based upon the final decision of a prison official prior to adjudication by the Commission. Article 41, §204F(d). See also, Regulations of the Inmate Grievance Commission, #12.07.01.

G. The Rule That Exhaustion Of Federal Administrative Remedies May Be Required In Actions Brought Against Federal Defendants Does Not Suggest That Exhaustion Of State Administrative Remedies May Be Required In An Action Brought Under 42 U.S.C. §1983 Nor Is The Doctrine Of Abstention Applicable To This Case.

Petitioners rely upon cases requiring the exhaustion of federal administrative remedies to support their claim that Respondents must exhaust a state administrative remedy. (Pet. Br. at 66-69). The cases cited by Petitioners were actions brought by U.S. military personnel and federal prisoners who alleged that their rights had been violated by officials, employees or agencies of the government. The underlying reasons for an exhaustion requirement where a cause of action is against a federal defendant, and the relevant federal statute or regulation prescribes an administrative remedy,[65] are not applicable to the present case. In the military context, for example, the rationale for the exhaustion rule "lies in purposes intimately related to the autonomy and proper functioning of the particular administrative system Congress has constructed." *McGee v. United States*, 402 U.S. 479, 483 n.6 (1971). See also, *Kochie v. Norton*, 343 F. Supp. 956, 960-61 (D. Conn. 1972).

By comparison, in discussing 42 U.S.C. §1981, this Court was held that the supplementary nature of federal court jurisdiction under that statute makes it imperative for a claimant to file his court action, without waiting for an administrative resolution of his claim, in order to avoid being barred by the statute of limitations.

[65] See, e.g., *McGaw v. Farrow*, 472 F.2d 952, 957-58 n. 17 (4th Cir. 1973).

Under some circumstances, the administrative route may be highly preferred over the litigatory; under others, the reverse may be true. We are disinclined, in the face of Congressional emphasis upon the existence and independence of the two remedies, to infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted, as, for example, a proscription of a §1981 action while an E.E.O.C. claim is pending .... But the fundamental answer to petitioner's argument lies in the fact—presumably a happy one for the civil rights claimant—that Congress has clearly retained §1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII. *Johnson v. Railway Express*, 421 U.S. 454, 461 and 465 (1975).

This Court's decisions in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) and *Schlesinger v. Councilman*, 420 U.S. 738 (1975), do not support Petitioners' argument that an exhaustion rule should be imposed in the present case. *Huffman* and *Schlesinger* considered the extent to which the federal courts should exercise, or should refrain from exercising, their equity powers to intervene in an ongoing, state civil proceeding and a pending military court-martial, respectively. The Court held in both cases that the federal courts should not have interfered. The decisions were principally based on the rationale behind the abstention doctrine expressed in *Younger v. Harris*, 401 U.S. 37 (1971),[66] and they do not undermine the no-exhaustion rule of *Monroe v. Pape, supra*. See, *Huffman v. Pursue, Ltd., supra* at 609 n.21.

[66] See, e.g., *Schlesinger v. Councilman, supra* at 761, Mr. Chief Justice Burger, concurring in the judgment.

Traditionally, the principles of abstention have been applied to prohibit federal injunctions against pending state judicial proceedings, *Younger v. Harris, supra; Huffman v. Pursue, Ltd., supra*; or in situations where there existed complex regulatory questions to be resolved through the application of administrative expertise, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); a mixed issue of federal and state law, *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964); or an "uncertain issue of state law," the resolution of which may eliminate or materially alter the federal constitutional question. *Harman v. Forssenius*, 380 U.S. 528, 534 (1965). None of these considerations apply to the present case, and abstention would therefore be inappropriate. See, *Procunier v. Martinez, supra* at 400-04; *Rodriguez v. McGinnis, supra* at 80-81, Chief Judge Friendly, concurring.

H. This Court Should Not Assume The Role Of Congress By Imposing An Exhaustion Rule In Prisoner §1983 Cases.

This Court has recognized its own limitations in establishing the powers and duties of the federal judiciary and has consistently held that decisions concerning matters of fundamental policy are for Congress, not the Court, to make. See, *e.g., Flood v. Kuhn*, 407 U.S. 258 (1972).[67] Congress has responded with new laws when it deemed such legislation was necessary. For example, in light of

[67] In *Rubin v. Weinberger*, 524 F.2d 497 (7th Cir. 1975), the court found that Congress expressly sought to avoid overburdening the courts when it limited review of Social Security Administration actions.

Fay v. Noia, 372 U.S. 391 (1963), Congress rewrote 28 U.S.C. §§2254 and 2255 to provide guidance to the federal courts in habeas corpus proceedings. Similarly, Congress has legislated exhaustion of remedies requirements in other areas; *e.g.*, the collection of state taxes (28 U.S.C. §1341) and state utility rate orders (28 U.S.C. §1342). See also, *Love v. Pullman Company*, 404 U.S. 522 (1972). On the other hand, Congress has not enacted an exhaustion requirement for 42 U.S.C. §1983. Its inaction is consistent with the Supreme Court's holding in *Monroe v. Pape, supra*, that Congress did not intend there to be an exhaustion requirement in such cases.[68]

If there is a need to re-examine the role of the federal courts in some kinds of constitutional cases, that task should be undertaken by Congress and not by the judiciary. In its enactment of §1983, Congress refused to limit the remedy to only certain classes of plaintiffs, rejected the notion that there may be exhaustion if the state remedy is adequate and decided not to use the federal district courts as appellate bodies to review state decisions. It is beyond the province of this Court to

[68] It is presumed that Congress is aware of this Court's decisions and the many decisions of the lower federal courts following the rule that exhaustion of state administrative remedies may not be required in §1983 cases. See, *Shapiro v. United States*, 335 U.S. 1, 16 (1948). The failure of Congress to amend the federal code to provide for an exhaustion requirement indicates congressional approval of the no-exhaustion rule. *Cf., United States v. Powell*, 379 U.S. 48, 55 n. 13 (1964).

amend the Civil Rights Act of 1871 by attaching an exhaustion requirement.[69]

I. The Maryland Inmate Grievance Commission Is Not An Adequate State Administrative Remedy.

The Supreme Court has recognized that even in cases where it may be appropriate for a federal court to require a plaintiff to exhaust administrative remedies, such exhaustion is unnecessary where the administrative remedy is inadequate. See, e.g., *Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973), and the cases cited there.

> State administrative remedies have been deemed inadequate by federal courts, and hence not subject to the exhaustion requirement, on a variety of grounds. Most often this has been because of delay by the agency (citation omitted), or because of some doubt as to whether the agency was empowered to grant effective relief (citations omitted). State administrative remedies have also been held inadequate, however, where the state administrative body was found to be biased or to have predetermined the issue before it (citation omitted). *Id.*

[69] In *Preiser v. Rodriguez, supra*, the Supreme Court gave deference to congressional intent, 411 U.S. at 489-90 and 492 n. 10, and declined the invitation to "graft the habeas corpus exhaustion requirement onto prisoner actions under the Ku Klux Klan Act." *Id.* at 503, Mr. Justice Brennan, dissenting. Even Judge Aldisert, in his powerful attack on the continuing validity of the assumptions which motivated the passage of §1983, concludes that congressional action is necessary to effect the reforms for which he is arguing. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 Law & Soc. Order 557, 574-577. See also, *Rodriguez v. McGinnis, supra* at 83, Judge Feinburg, concurring ("the correct way . . . is not for us to indulge in judicial legislation but for Congress to enact an appropriate statute, which could take into account the conflicting policy considerations and could include compromises, limitations and safeguards that we as a court cannot legislate."). *Id.* at 84, Judge Oakes, concurring.

1. The Inmate Grievance Commission is not an independent and autonomous adjudicatory agency which can be depended upon to provide a Maryland prisoner with a fair opportunity to obtain relief.

The Inmate Grievance Commission is within the executive branch of the Maryland state government; specifically, it is a component of the Department of Public Safety and Correctional Services. The Secretary of the Department is ultimately responsible for the operation and administration of the Commission, including final approval of the rules, regulations, policies and practices of the Commission. The Secretary shares the same relationship with the Maryland Division of Correction and the Patuxent Institution, both of which are also within the Department of Public Safety and Correctional Services. (App. 355).

The Secretary is not a member of the Inmate Grievance Commission. His only functions with regard to the Commission, in addition to his ultimate responsibility for its operation, are to review the opinions of the Commission and to confer with the Executive Director concerning administrative matters (App. 355-57). Whenever the Commission makes a favorable ruling on a prisoner's grievance, its disposition is in the form of a "recommendation" to the Secretary who then may affirm, reverse or modify the recommendation. Article 41, §204F(f)(2), Annotated Code of Maryland. The action of the Secretary is the final decision on the grievance.

The office of the Attorney General of Maryland provides legal counsel to the Secretary, the Inmate Grievance Commission, the Division of Correction and the Patuxent Institution. The Commission refers legal questions to the Attorney General, and his opinion would

affect the disposition of the grievance under consideration. Similarly, the Secretary seeks advice from the Attorney General when he reviews the recommendations of the Commission (App. 313-15).

The involvement of the office of the Attorney General in the operation of the Inmate Grievance Commission may be summarized by the following hypothetical situation (T. 69-70):[70] A Division of Correction or Patuxent Institution employee against whom a grievance is filed, may be presented at a hearing before the Commission by an Assistant Attorney General. During deliberation by the Commission, if a legal question were involved, an Assistant Attorney General would be asked for advice. If the grievance were found to be meritorious, and a review by the Secretary therefore required, the Secretary also could call upon an Assistant Attorney General for an opinion. If the prisoner appealed the final decision of the Commission or the Secretary, the respondent would be represented in court by an Assistant Attorney General. If the complainant prevailed in his appeal, the office of the Attorney General would be called upon by the Division of Correction or Patuxent Institution to assist in the implementation of the appropriate relief. The potential conflicts of interests engendered by the representation by the Attorney General's office of the Secretary, the Commission and the agencies which appear before the Commission as parties against whom grievances have been filed, is substantial and to the detriment of any complaining prisoner.

In a situation raising similar conflict of interest problems, where one Assistant Attorney General represented the petitioner before a state commission and another

[70] Reference is to the transcript of hearings before the District Court in *McCray v. Burrell, supra*, on June 11 and 12, 1973.

Assistant represented the commission at a later hearing, a Connecticut court applied the Code of Professional Responsibility and found the action unprofessional and unsupportable. *Quist v. Connecticut Commission on Human Rights*, Connec. Court of Common Pleas, 11/10/75, 44 L.W. 2249 (12/9/75). Further, this Court was held that in situations less obvious than in *Quist* or the Maryland Grievance Commission procedure, the mere appearance of biased conduct must be avoided. As Mr. Justice White stated:

> There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disasterous extent. *United States Civil Service Comm. v. Natl. Assoc. of Letter Carriers*, 413 U.S. 554, 565 (1973).

The rights of a prisoner in an Inmate Grievance Commission proceeding are most seriously disregarded when a recommendation of the Commission is reviewed by the Secretary of the Department of Public Safety and Correctional Services. Under Article 41, §204F(f)(2), every decision of the Inmate Grievance Commission in which a prisoner's complaint is found to be wholly or partially meritorious must be reviewed by the Secretary. It is the normal procedure for the Secretary, upon receipt of such a decision, to solicit and receive facts and opinions from the Commissioner of the Maryland Division of Correction and the Director of the Patuxent Institution concerning the matter at issue and for the Secretary to make use of those facts and opinions in his decision to affirm, reverse or modify the recommendations of the Commission.

The following excerpts are from a deposition taken of the Secretary on February 28, 1974, by counsel for Washington:

> Q [by Mr. Morgan]: Is it your practice, Secretary Lally, before issuing what would be the final order in the case, your order, have you ever issued a proposed order to both parties, either/or both parties, for their comment and then issue your final order?
>
> A [by Secretary Lally]: I have never issued a proposed order. I draft my order and send it to the Division of Corrections, as a matter of policy, or it could be Patuxent, for that matter, because those are the only two agencies that are involved under the Inmate Grievance Commission Act. As a matter of policy, I send it to the head of the Division of Corrections or Patuxent, giving them a two or three day period to respond to it, before I issue the final order. (App. 364).
>
> * * * * * *
>
> Q What happens, Secretary Lally, if a comment comes back from the Division of Correction or Patuxent after the three-day period taking some objection to your ruling, which by that time has become final? What is your practice then?
>
> A I would weigh whatever they had to say and take it into account when I drafted the final order. (App. 365).
>
> * * * * * *
>
> Q . . . What is the purpose of that three-day period, Secretary Lally?
>
> A I don't pretend to know all of the problems of the institution and I have often found in the findings of fact that the person representing the institution is not always knowledgeable of the total problems of the institution, and I don't have sufficient facts to make a final decision on it.

> Q And so that three-day period is for what?
>
> A Looking for sufficient facts upon which I could make an intelligent decision on the order. (App. 366-67).
>
> * * * * * *
>
> Q And, when the order is received, the proposed draft order is received by Dr. Boslow or Mr. Jordan, it's their understanding, I assume, that they have three days in which to make some kind of statement to you if they have a statement to make?
>
> A Yes. In fact, they are explicitly told in the letter that the inmate will not be given a copy of the order until three days hence.
>
> Q And their understanding and your understanding of that three-day period, as I take it, is that that is a three-day period in which they have an opportunity to respond to you about the order?
>
> A That's correct. (App. 373).

The solicitation of additional evidence from prison officials by the Secretary after he receives a decision from the Grievance Commission is completely *ex parte*. Neither the inmate or his counsel, if he has counsel, is made aware of its occurrence or given an opportunity to respond (App. 372). The Secretary relies on the evidence he receives to review Commission decisions, and his final action based on that evidence may be to reverse or substantially modify a decision which was originally favorable to the inmate.[71]

[71] For example, in I.G.C. No. 1295, *Curtis E. Midgett, et al.*, the Secretary reversed a Grievance Commission decision which was highly favorable to the inmates based on information he received after the hearing from the Commissioner of the Division of Correction. The inmates were never told of the *ex parte* communications between the Secretary and the Commissioner and never given an opportunity to respond. The transaction is fully described in the Appendix at 264-74 and 367-72. There have also been other cases where the Secretary has utilized facts obtained after a hearing, without the inmate's knowledge, to modify a favorable Commission decision (App. 373).

The Secretary's policy and practice of giving prison officials the opportunity to confidentially object to Grievance Commission decisions and submit additional evidence after the Commission has made findings of facts and reached a conclusion based on those facts, renders the hearing procedure meaningless and deprives the affected inmate of his right to a fair hearing. The Court of Appeals of Maryland has held in another context that it is well-established and settled law in Maryland that administrative agencies " 'must observe the basic rules of fairness as to parties appearing before them.' (citation omitted)." *Rogers v. Radio Shack*, 271 Md. 126, 129 (1974). An agency may not rely upon a written report without providing the parties with an opportunity for cross-examination or rebuttal. *Id.* See also, *Dal Maso v. Bd. of County Commissioners*, 238 Md. 333, 337 (1964). In *Temmink v. Bd. of Zoning Appeals*, 205 Md. 489, 497 (1954), where the agency relied upon data which the parties had no opportunity to challenge, the Court of Appeals held that "the personal knowledge of the members of the Board or of some other officials upon whom they rely cannot be considered as evidence. . . ."

"One of the basic requirements of fair procedure is that an agency's decision should be based upon the evidence produced at the hearing before the agency." Cohen, *Some Aspects of Maryland Administrative Law*, 24 Md.L.Rev. 1, 15 (1964). For an agency to base its decision on evidence outside of the record is unconstitutional as a denial of due process of law. See, *United States & I.C.C. v. Abilene & Southern Railway Co.*, 265 U.S. 274, 289 (1924); Cohen, *supra* at 16-18.

The statutory delegation of power to the Secretary to affirm, reverse or modify the recommendations of the Commission is arguably unconstitutional. Under Article

41, §204F(f)(2), the Secretary may exercise his power "where he disagrees with the findings and conclusions of the Commission." There is no other standard to guide his discretion, and although the issue has not been decided by the Maryland state courts, similar delegations of authority have been found constitutionally insufficient. See, *County Commissioners v. Northwest Cemetery Co.*, 160 Md. 653 (1931); *Maryland Theatrical Corp. v. Brennan*, 180 Md. 377 (1942). The Secretary has testified that the range of possible actions he could take in reviewing a Grievance Commission decision "could be as broad as your imagination" (App. 360). The Executive Director of the Commission has described the statutory delegation of power to the Secretary as "a shotgun legislative phrase" permitting him to take "whatever action he deems appropriate" (T.59).

When the Commission submits its recommendations to the Secretary for his review, the Secretary receives only the written decision of the Commission. He does not review the tape of the hearing, the evidence presented at the hearing, the papers submitted by the parties or any contents of the Commission file (App. 318, 361).

The Secretary has not formulated any written standards to guide his discretion in reviewing the recommendations of the Commission (App. 363). The Inmate Grievance Commission statute not only lacks standards for review but also fails to provide sufficient procedural safeguards against unreasonable, arbitrary or capricious exercise of the delegated powers. See, *Truitt v. Board of Public Works*, 243 Md. 375 (1966).

Judicial review is provided for by Article 41, §204F(1), but it is "limited to a determination of whether there was a violation of any right of the inmate protected by federal or State laws or Constitutional

requirements." There is no right of appeal beyond the Circuit Court to the Court of Appeals or Court of Special Appeals. See, *Urbana Civic Association v. Urbana Mobile Village*, 260 Md. 458 (1971). Furthermore, the reviewing court is "limited to a review of the record of the proceedings before the Commission and the Secretary's order, if any, pursuant to such proceedings." Independent, *de novo* review of the record is therefore precluded.

When an inmate receives a final adverse decision in his case, he is not informed by the Commission of his right to appeal, and he is not advised of the procedure to file an appeal (T.49-50). Appellant McCray testified that he had not filed such an appeal because he was unaware of the proper papers and the proper court in which to file.

The Commission or Secretary has found the complaints of prisoners to be without merit in more than 300 cases, yet as of February 27, 1974, only 24 of those adverse decisions had been appealed. The results on appear were 5 affirmances, 4 reversals, 5 remands for new hearings, and 10 appeals pending (App. 323-25). It is the policy and practice of the Circuit Courts of Maryland to not appoint counsel for indigent prisoners in Inmate Grievance Commission appeals (T.67-68).

2. The fact-finding process of the Maryland Inmate Grievance Commission does not afford a full and fair hearing on the constitutional claims of prisoners.

The inadequacy of the Inmate Grievance Commission as an effective administrative remedy is apparent when one compares the paucity of procedural safeguards which are afforded a prisoner before the Commission with the full panoply of due process guarantees to which all other

classes of litigants are entitled in virtually every other Maryland administrative agency proceeding. See, the Maryland Administrative Procedure Act, Article 41, §§244 *et seq.*, Annotated Code of Maryland, the pertinent parts of which are reproduced in the Addendum to the Respondents' brief.

1. The screening of prisoner complaints.

Article 41, §204F(e) permits the Inmate Grievance Commission to conduct a preliminary review of each complaint submitted to the Commission. "If upon such preliminary review the grievance or complaint is determined to be on its face wholly lacking in merit, it may be dismissed . . . without a hearing or without specific findings of fact." *Id.* These dismissals without hearings are ordered by the Executive Director of the Commission at his discretion without further review by any members of the Commission (App. 294-95). The following statistics, cumulative as of the dates indicated, are relevant (App. 339-44):

	5/31/73	8/31/73	11/30/73	1/31/74
Complaints received (since 7/1/71)	923	1119	1274	1385
Administrative dismissals	507	590	700	752
Hearings held (since 11/1/71)	318	376	491	533
Dispositions				
Meritorious in whole or part	103	113	136	152
Not meritorious	152	205	256	296
Moot	10	13	16	18
Pending disposition	50	42	79	67

A summary of the grievances dismissed administratively by the Executive Director, without hearings, be-

tween December 1, 1973 and February 28, 1974, a representative and typical 90-day period of operation for the Commission (App. 294), is as follows (App. 285-94; Deposition of Dene L. Lusby, February 28, 1974, pages 12-75):

1. Complaints dismissed (45)[72]
   a. Totally lacking in merit (7)
   b. Lacking in specificity (1)
   c. No controversy (4)
   d. Moot (6)
   e. Lack of subject matter jurisdiction (14)
   f. Lack of jurisdiction over the person (1)
   g. Abstention in favor of a court (6)
   h. Lack of prosecution (4)
   i. No possible relief could be granted (2)
2. Informal resolutions to the satisfaction of the inmate (4)
3. Explanation of sentence computation (3)
4. Provision of information to a relative (1)
5. Withdrawn by inmate (10)
6. Total (63)

These statistics indicate at least three serious deficiencies in the Commission's proceedings. First, there is no

[72] In at least one of these cases, an inmate complained that his constitutional rights had been or were being violated by prison officials, but his complaint was dismissed without a hearing. Leo J. Rites, a prisoner at Patuxent Institution, alleged that (1) he was being denied due process by not being permitted to have his counsel present at a disciplinary hearing, (2) his First Amendment rights were being violated by prison mail censorship regulations, (3) he was placed in "solitary confinement" under cruel and unusual conditions and for a disproportionate period of time and (4) he was being denied proper medical care, entrance into rehabilitative programs and decent living conditions. See Appendix at 287-94, 330-32 and 345-52.

requirement by statute, regulation or common practice that a prisoner who files a grievance will be afforded a hearing before the Commission. In fact, 752, or 54%, of the total of 1385 complaints received by the Commission have been dismissed without a hearing (App. 339). By comparison, the Maryland Administrative Procedure Act provides that "[i]n any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice." Article 41, §251.

Second, although the Inmate Grievance Commission statute provides for the preliminary review of grievances, it only authorizes the Commission to dismiss a grievance without a hearing if it is determined "to be on its face wholly lacking in merit." Article 41, §204F(e). The statute does not permit the investigation of grievances to determine if they warrant a hearing nor does the statute provide for the informal disposition of grievances. The Executive Director, however, regularly engages in the investigation of grievances as part of the preliminary review procedure, and he enters into negotiations with prison officials without the knowledge or consent of the complaining party (App. 284-85, 302-10; T.56). Compare, the Maryland A.P.A., Article 41, §251 which provides that "[i]nformal disposition may also be made of any contested case by stipulation, agreed settlement, consent order, or default."

Third, it is apparent that a very small number of prisoners who petition the Commission are found to have wholly or partially meritorious claims. Of 1385 complaints received, the Commission has recommended some relief in only 152 cases (11%). The substantial likelihood of obtaining an adverse decision from the Commission renders it of questionable viability as an effective remedy for purposes of exhaustion. See, *City Bank Farmers'*

Trust Co. v. Schnader, 291 U.S. 24 (1934); *Jeffers v. Whitley*, 309 F.2d 621, 627-28 (4th Cir. 1962).

2. Hearings before the Inmate Grievance Commission.

Assuming a prisoner's grievance were to survive the preliminary screening process, it would be set for a hearing before the Commission. The scheduling of hearings is based upon two factors. First, cases are heard in the order in which they are received by the Commission. Second, a day of hearings is scheduled at each prison when the Commission accumulates enough cases from a prison to fill a day of hearings (App. 296).

The Commission will occasionally assign priority to a case and have it set for a hearing before other grievances which may have been received earlier (App. 296-97). There are no exceptions to the policy of accumulating a sufficient number of cases from each prison to fill a day of hearings before visiting a prison (App. 297). The Commission does, however, assume the authority to issue "interim orders" (App. 297).

An "interim order" is an order issued without a hearing (App. 297). Since its inception, the Commission has issued one interim order. (App. 297-302). In I.G.C. No. 1383, *James Bradley, et al.*, the Commission received the complaint on July 11, 1972, and issued an order that day without a hearing. A hearing was subsequently held on August 7, 1972, and a final decision was made on September 22, 1972 (App. 300-01).[73]

[73] In one other case the Commission issued an order before making a final decision. In I.G.C. No. 1521, *Joseph Wallace*, the Commission received a grievance on September 25, 1972, and a hearing was held on November 29, 1972. On December 4, 1972, the Commission recommended that the prisoner be transferred to a hospital. On December 13, 1972, the hearing was concluded, and a final decision was issued on April 26, 1973 (App. 301-02).

The Inmate Grievance Commission is authorized by Article 41, §204F(g) to investigate prisoner complaints and to gather the information necessary to review them. The Executive Director conducts the investigations, and prior to each hearing, he prepares a file which contains the complaint, his reports and memoranda, and the letters, documents and other materials he has gathered (App. 302-08). The investigation typically involves interviewing prison officials and obtaining letters, statements and prison records about the subject matter and persons involved in the grievance. *Id.* It is extremely rare that a prisoner is contacted during the investigation except to request from him a list of the witnesses he desires to have present at the hearing (App. 304). In addition, the prisoner is not informed that an investigation has taken place, nor is he informed of the content of the file that is before the Commission during his hearing (T.52-53, 56-57). He therefore does not have an opportunity to rebut or otherwise challenge the *ex parte* information upon which the Commission may rely in making a decision.

Administrative agencies in Maryland are generally authorized to gather relevant information, to take notice of judicially cognizable facts and to utilize their own specialized knowledge, A.P.A., Article 41, §252(b) and (d); however, an agency must offer and make a part of the record all evidence it has gathered and upon which it will rely in the determination of the case, and it must provide the parties with notice and an opportunity to contest any facts judicially noticed or within the special expertise of the agency. *Id.*

By comparison, the Inmate Grievance Commission statute places virtually no restrictions upon the ability of the Commission to investigate a complaint, to gather

information or to consider all kinds of evidence without ever informing the prisoner or providing him with an opportunity to contest those facts.[74] The unfairness to the prisoner of this procedure is exacerbated because the party against whom a complaint is made is not required or requested by the Commission to file or to serve upon the prisoner a responsive pleading prior to the hearing (T.57). In addition, there is no provision in the statute or regulations of the Commission for pre-hearing discovery by the prisoner (App. 309; T.63).

An inmate is permitted to be represented by counsel at a Grievance Commission hearing, but counsel is not appointed for an indigent inmate who may request representation (App. 335). During the 90-day period from November 19, 1973 to February 20, 1974, the Commission issued recommendations in 127 cases. The prisoner was represented by counsel at 15 hearings, by a law student at 12 hearings, and by another prisoner at 34 hearings. The prisoner represented himself at 66 hearings (App. 275-82). There have been occasions when the party against whom a complaint was made was represented by an Assistant Attorney General, and the inmate who filed the grievance was unrepresented by counsel (T.65-66).

The Maryland Administrative Procedure Act provides that in contested cases, "[e]very party shall have the right of cross-examination of the witnesses who testify, and shall have the right to submit rebuttal evidence." Article 41, §252(c). The standards by which State agencies are governed in determining the admission and

[74] In addition to the evidence which is gathered *ex parte* by the Commission during the investigation stage before a hearing, on at least a dozen occasions, the Commission has solicited and received additional evidence after the hearing has been held (App. 317-18).

effect of evidence are established by the A.P.A. in §252(a).

A prisoner does not have the right to confront or cross-examine adverse witnesses at his Grievance Commission hearing. "The inmate shall have a reasonable opportunity to question any witnesses who testify before the Commission." Article 41, §204F(h). There is no provision for cross-examination of witnesses in the Commission regulations (T.74-75). In addition, a prisoner's witnesses may not be required to attend a hearing if they are not "available at reasonable times." Inmate Grievance Commission Rule 12.07.04(2). The Commission has the power to issue subpoenas, §204F(g), but it has never exercised that power (T.23-24, 63, and 97). On at least one occasion, a correctional officer appeared before the Commission and refused to testify. His testimony was not compelled by the Commission (T.98-101). On other occasions, inmates have been denied the witnesses of their choice on the ground that institutional records alone will be used as evidence at the hearing (App. 286-87; T.64-65).

The Commission has the discretion to limit the testimony that an inmate may elicit by restricting the number of witnesses he may call. Article 41, §204F(h). There are no written standards by statute or regulations which guide the discretion of the Inmate Grievance Commission in its decisions concerning the witnesses that may be allowed to testify at a hearing or the nature of permissible testimony. Witnesses do not testify under oath or affirmation at Commission hearings (T.15).

In every case where the Commission finds the grievance of an inmate to be wholly or partially meritorious, it may recommend to the Secretary of the Department of Public Safety and Correctional Services that the inmate

be afforded relief. Article 41, §204F(f)(2). Any decision which is favorable to an inmate is not final without the approval of the Secretary. *Id.* The Secretary, however, is not present at Commission hearings (T.61-62) nor does he receive the full record of cases for his review (App. 318, 361). Under the Inmate Grievance Commission statute, and in practice, the Secretary may reverse or modify a recommendation of the Commission making the final decision adverse to a prisoner. Article 41, §204F(f)(2). There are no procedural safeguards, however, to protect a prisoner from arbitrary action or reliance upon misinformation by the Secretary. Compare, Maryland A.P.A., Article 41, §253.

The lower court stated that the availability of judicial review protects a prisoner from arbitrary action by the Commission and the Secretary. For example, "[a]ny unreasonable refusal to allow an inmate to call a witness is reviewable in state court," 375 F. Supp. at 1301; and

opportunity to have records and documents present at a hearing] is reviewable in state court." *Id.*; and "[a]ny future disposition of the Secretary to act in an arbitrary manner is inhibited by the review available in state court." *Id.*

For purposes of determining the adequacy of an administrative remedy, however, it is not relevant that judicial review in the state court is available. The exhaustion of state judicial remedies is clearly not a requirement in §1983 cases. *Monroe v. Pape*, 365 U.S. 167, 183 (1961). And in cases where exhaustion of a state administrative remedy is a prerequisite to proceeding in federal court, judicial review of the state agency decision in the state court system is not a part of the exhaustion requirement. *Huffman v. Pursue*, 420 U.S. 592 at n.21

(1975); *Gibson v. Berryhill*, 411 U.S. 564, n.11 (1973); *Polk v. State Bar of Texas*, 480 F.2d 998, 1003, n.13 (5th Cir. 1973); *Palmigiano v. Mullen*, 491 F.2d 978 (1st Cir. 1974); *Wishart v. McDonald*, 367 F. Supp. 530 (D. Mass. 1973). The availability of an appeal to a state court from a decision of the Grievance Commission, therefore, affords no protections for a §1983 litigant whose claim is relegated to the Commission for purposes of exhaustion because such an appeal need not be pursued to complete the exhaustion requirement.

In proceedings before the Inmate Grievance Commission, under Article 41, §204F, the regulations of the Commission, and its common practice, there is little guarantee that a prisoner will receive a full and fair hearing on his claim or that a meaningful record will be developed. The procedures of the Commission do not present Maryland prisoners with a "fair opportunity to be heard" nor a "realistic expectation that resort to the proceedings" will afford relief from alleged deprivations of their constitutional rights. See, *Toney v. Reagan*, 467 F.2d 953, 958 (9th Cir. 1972), cert. denied, 409 U.S. 1130 (1973). Appellants do not suggest that Maryland must provide "the perfect grievance procedure," *Id.* at 960, but the Inmate Grievance Commission falls far below the minimum standards which a state administrative remedy would be required to meet for purposes of

exhaustion in an action brought under the Civil Rights Act.[75]

The Commission's complete disregard for the most fundamental notions of due process is nowhere so vividly described as in one member's dissent to a Commission finding. See, Resp. Br., Addendum D. In *In the Matter of: William Bryant*, I.G.C. No. 3599, Commissioner James V. Bennett noted at the beginning of his dissenting opinion that he was erroneously listed as concurring in the result.

> This was apparently due, in part, to the fact there was, as usual, no discussion of the case among the members prior to the drafting of the order and also to the general confusion, din, and noise surrounding the proceedings.

Mr. Bennett's dissent is unfortunately reminiscent of Professor Davis' excoriating criticism of the United States Parole Board, and Davis' conclusions are equally apposite here:

> How could a board member have less incentive to avoid prejudice or undue haste than by a system in

[75] In *Toney v. Reagan, supra*, the plaintiffs were nontenured college professors who sought to have the federal court enjoin their employment from being terminated. In reviewing the adequacy of the State administrative remedy, the Court of Appeals recognized that "educated college professors [who] are weighing issues of tenure and faculty qualifications," 467 F.2d at 958, at a hearing before their peers, do not require the same procedural safeguards to protect their rights as may be required by other litigants; *e.g.*, welfare recipients, *Goldberg v. Kelly*, 397 U.S. 254 (1970) and parolees, *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Griffin v. California Adult Authority*, 464 F.2d 602 (9th Cir. 1972). The vast majority of Maryland prisoners are poor and uneducated representatives of an economically and socially oppressed class. The proceedings to which their constitutional claims are relegated therefore must bear the burden of assuring that those claims are properly articulated, fully heard and fairly decided.

> which his decision can never be reviewed and in which no one, not even his colleagues, can ever know why he voted as he did? Even complete irrationality of a vote can never be discovered. Should any men, even good men, be unnecessarily trusted with such uncontrolled discretionary power? K. Davis, *Discretionary Justice* (1969).

See also, L. Jaffe, *The Illusion of the Ideal Administration*, 86 Harv. L. Rev. 1183 (1973), and *Plano v. Barker*, 504 F.2d 595, 598 (2nd Cir. 1974).

3. The inability of the Maryland Inmate Grievance Commission to grant effective relief and the excessive delay by the Commission in its disposition of prisoner complaints renders the Commission an inadequate administrative remedy for purposes of exhaustion.

1. The Inmate Grievance Commission, having heard the complaint of a prisoner and believing it to be meritorious, has no power to grant relief directly to the prisoner. The Commission's decisions are subject to automatic review by the Secretary of the Department of Public Safety and Correctional Services who receives them in the form of "recommendations" (App. 327; T.60-61). The Secretary is empowered to accept, reject or modify any recommendation of the Commission which is favorable to a prisoner. Article 41, §204F(f)(2).

In addition, the Commission is not an "enforcement agency" (T.71). It has no power to exercise continuing jurisdiction over the parties before it to assure implementation of any relief which may be granted. The final decision in each case is made by the Secretary, and the responsibility for enforcement lies outside the Commission with the Secretary (T.70-72).

This Court has held that an administrative remedy is inadequate and need not be exhausted where

> the only function of the (agency) is to investigate, recommend and report. It can give no remedy. It can make no controlling finding of law or fact. Its recommendation need not be followed by any court or administrative or executive officer. *United States Alkali Export Association v. United States*, 325 U.S. 196, 210 (1945).

See also, *McNeese v. Board of Education*, 373 U.S. 668, 674-75 (1963), where the trier of the facts had "no power to order corrective action."

The Inmate Grievance Commission, for all it may be worth as an informal and simple internal grievance mechanism to hear the complaints of Maryland prisoners, and to recommend relief where appropriate, is not capable of protecting the constitutional rights of prisoners who seek to vindicate their claims in federal court. The Commission does not possess any powers beyond its authority to investigate complaints, hear grievances and make recommendations to the Secretary. The final decisions of the Secretary, although they may be made in perfect good faith, are inevitably influenced by fiscal, political and administrative considerations (App. 205-207). See, *e.g., Gibson v. Berryhill, supra* at 596 Under these circumstances, the state administrative procedure is not an adequate substitute for a federal action nor may it be a prerequisitie to proceeding in federal court.[76]

[76] Robert T. Coulter, the first Executive Director of the Commission, testified at the hearings in *McCray v. Burrell*, and McCray placed Mr. Coulter's letter of resignation from the Commission into evidence. In the letter, Mr. Coulter expressed his concern over the inability of the Commission to bring about long-overdue changes in certain policies of the Maryland prison system. He described the inability of the Commission to grant effective relief, its inability to enforce or implement its decisions and the regular circumvention by the Division of Correction and Patuxent Institution of the Secretary's orders. He described the Commission as "little more than an arbiter of misery." (T. 101; Plaintiff's Exhibit 7).

2. A state remedy may be rendered ineffective for the vindication of federal constitutional rights if the remedy does not provide for prompt adjudication. See, *Gibson v. Berryhill, supra* at 575 n.14; *Strouth v. Peyton*, 404 F.2d 537 (4th Cir. 1968). If resort to a state administrative remedy requires an excessive delay in the plaintiff[s ability to return to federal court, exhaustion of the remedy may not be required.

The loss of time in the adjudication of constitutional claims is particularly harmful to prisoners. Unlike all other litigants who enjoy their freedom during the pendency of an action, a prisoner often is challenging the failure of prison officials to provide basic rights which are of immediate concern, such as the prisoner's mental and physical health, his personal safety or his ability to enjoy even the most basic amenities of prison life. See, *e.g., Woodhous v. Commonwealth of Virginia*, 487 F.2d 889 (4th Cir. 1973); *Holt v. Sarver*, 442 F.2d 304 (8th Cir. 1971); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971); *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972). It may not be merely the loss of income or other benefits but rather, the quality of life itself which is at stake.

The statistics in the Addendum to the Respondents' Brief, compiled from the Affidavit at App. 275-82, indicates the enormous amount of time which is required for a prisoner to receive a decision from the Inmate Grievance Commission. First, during the period from June 1, 1972 to June 18, 1973, the Commission issued a total of 238 decisions. The median time between the filing of a grievance and the issuance of a final order was five months. Second, for a total of 127 cases decided by the Commission between November 19, 1973 and February 20, 1974, the median time elapsed between the date

on which a complaint was initiated and the date on which a final decision was made was 24 weeks.

The principle that an administrative remedy may be considered inadequate on account of delay is particularly applicable to the Inmate Grievance Commission where there is only the remote possibility that the state remedy is willing or able to afford a prisoner the relief he seeks, and to require exhaustion would be to needlessly delay the final decision on his claims by a federal court.

III.

THE CONFINEMENT OF RESPONDENT McCRAY IN "MENTAL OBSERVATION" AND "ISOLATION" CELLS DENIED RESPONDENT DUE PROCESS OF LAW AND CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Introduction

In reviewing the conditions existing in the solitary cells in which McCray was confined and the conduct of the petitioners in imposing this confinement, this Court is not called upon to review "legislatively authorized punishments" and therefore is not constrained by the "primacy of the legislative role [which may] narrowly confine the scope of judicial inquiry." *Furman v. Georgia*, 408 U.S. 238, 384 (1972) (dissenting opinion of Mr. Chief Justice Burger). There exists in Maryland no specific state statute which authorizes or mandates the

maintenance of solitary cells by petitioners,[77] especially under the conditions existing in the instant cases. Accordingly, affirmance of the Fourth Circuit opinion would be consistent with "judicial findings of impermissible cruelty [resulting from] offensive punishments devised without specific authority by prison officials, not by legislators." *Id.* (citations omitted).

Furthermore, as will be discussed in more detail below, the conduct of petitioners in imposing the challenged confinements was, in several critical regards, in contravention of an existing written policy of the Maryland Division of Correction which governed the administration of the isolated confinement and mental observation cells. These circumstances negate any justifications for judicial restraint which might be relevant if the conduct of petitioners had been authorized by legislation or by administrative regulation.

Petitioners contend that the Fourth Circuit erred insofar as "it made no finding that the district court was clearly erroneous". Petitioners' Brief at 99. Petitioners seem to imply by this argument that the Fourth Circuit reversed, *sub silentio*, significant findings of fact made by the district court. This, however, is not the case. The Fourth Circuit expressly stated that it was accepting the extensive findings of fact and the questions of credibility which were resolved by the district court. 516 F.2d at 365.[78] A comparison of the factual findings of the

[77] Md. Ann. Code, Art. 27, §667 establishes the Maryland Division of Correction and §676 empowers the Commissioner of the Division to adopt rules and regulations. But there is no Maryland statute specifically authorizing or governing the use of solitary cells. *Compare, e.g.*, Art. 41, Sec. 707, Tenn. Code Ann. (Authorizing solitary confinement for violation of prison rules); Vol. 12A, Sec. 216.455, Ann. Mo. Stat. (*Accord*).

[78] "The district court made extensive findings of fact, resolving questions of credibility, and we accept those findings. We disagree, however, with the legal conclusions to be drawn therefrom." *Id.* See also, *Id.* at 367.

district court and the summary of facts of the Fourth Circuit confirms the accuracy of the Fourth Circuit's statement.[79]

The *Burrell* and *Smith* cases have several factual similarities. The initial decision in *Smith* to separate McCray from the general prison population was prompted by petitioner Smith's judgment that such separation was immediately necessary to maintain proper prison security. The decision by petitioner Burrell to separate McCray from the prison population was prompted by his judgment that such separation was necessary to preserve prison security and also, to protect McCray from potential self-imposed harm. The decision of the district court emphasized that in both cases the isolation of McCray was not disciplinary; *i.e.*, it was not imposed as punishment. 367 F. Supp. at 1215.

Once the decision to isolate McCray was made in both cases, however, the putative justification for the *nature* and *conditions* of the imposed isolated confinement was the same: to guarantee McCray's safety from self-destructive acts. It was the rationale of protection against self-harm that was offered by petitioners[80] before the district court to justify the harsh conditions of the mental observation and isolation cells. This rationale was accepted by the district court,[81] but it was rejected by the Fourth Circuit[82] as a justification for the harsh

[79] *Compare* 367 F. Supp. at 1210-1216 with 516 F.2d 365-369.

[80] *See Appendix* at 76a, 77a, 173a, 197a.

[81] "The plaintiff's clothing and mattress were removed in both cases when he was placed in an isolation cell, in a reasonable attempt to prevent him from injuring himself." 367 F. Supp. at 1215.

[82] "While we accept the district court's findings that McCray's confinement in isolated cells were not intended as punishment but for mental observation and as a precaution against a not unreasonable fear that McCray might harm himself, we are constrained to conclude that McCray's eighth amendment right to be subjected to 'cruel and unusual punishment' was violated." 516 F.2d at 367.

conditions of the mental observation and isolated confinement cells.

B. The Proper Standards of Eighth and Fourteenth Amendment Review

Respondent McCray does not in the instant cases challenge the decisions by petitioners to separate or segregate him from the general prison population on the two occasions in question. McCray concedes that there was ample cause in both instances to justify some form of immediate segregation. Indeed, it is apparent that prison officials have the right and duty to segregate troublesome or troubled prisoners from the general population in order to maintain necessary prison security or to provide protection to the inmate so separated. *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. den. sub. nom., Oswald v. Sostre*, 405 U.S. 978 (1972); *Novak v. Beto*, 453 F.2d 661 (5th Cir. 1971), reh. den. 456 F.2d 1303, *cert. den. sub. nom., Sellars v. Beto*, 409 U.S. 968 (1972); *Ford v. Board of Managers*, 407 F.2d 937 (3rd Cir. 1969).

Nor does McCray contend that petitioners had an obligation to afford him an administrative hearing consistent with *Wolff v. McDonnell*, 418 U.S. 539 (1974), prior to his separation from the general population. Instead, McCray contends that his confinement under the circumstances and conditions described above denied him, in each instance, rights guaranteed by the Eighth and Fourteenth Amendments of the United States Constitution because:

(1) The conditions existing in the solitary cells and the process followed by petitioners in imposing these periods of confinement bore no reasonable relationship to the

purpose of that confinement—the protection of McCray from himself—and were, therefore, arbitrary and unnecessarily harsh and cruel; and

(2) The conditions existing in the solitary cells were inconsistent with minimal concepts of human dignity and evolving standards of decency and are unacceptable to contemporary society.

These tests of measuring the prohibitions of the Eighth Amendment and the protections of the Fourteenth Amendment were applied by both the district court and the Fourth Circuit in analyzing the instant cases.[83] These tests are consistent with prior decisions of lower courts[84] and this Court. In *Furman v. Georgia, supra,* Mr. Justice Brennan, summarizing the Eighth Amendment decisions of this Court, concluded that the Eighth Amendment would invalidate, *inter alia*:

1) Punishments which are "so severe as to be degrading to the dignity of human beings," *Id.* at 291;

2) Punishments which are "arbitrarily" inflicted, *Id.* at 274;

[83] The Fourth Circuit stated that "we perceive that two tests for violations of the eighth amendment are relevant in the cases before us. First, are the conditions of punishment sufficiently 'shocking' that they amount to 'cruel and unusual' punishment? Second, does the punishment constitute some rational means to reach a permissible end or is it, instead, arbitrary, unreasonable, or unnecessary? The district court phrased this second test as requiring that there not be a 'less severe alternative that would have achieved the purposes for which the confinement was imposed', 367 F. Supp. at 1216, and its phraseology does not seem inaccurate to us." 516 F.2d at 368 (citations omitted). Although the language of the tests applied by the lower courts is not precisely identical to that stated by McCray above, the substance of the tests adopted by the lower courts and those offered by McCray is the same. Petitioners seem to agree that the applicable tests are those stated by the district court and the Fourth Circuit. *See* Petitioners' Brief at 95.

[84] *See* notes 109, 110, *infra.*

3) Punishments "unacceptable to contemporary society," *Id.* at 277; and

4) "Excessive" punishments. *Id.* at 279.

McCray contends that the application of these tests to the instant cases amply supports the decisions of the Fourth Circuit.[85] Two threshold observations are appropriate, however. First, while prior decisions of this Court have not directly resolved the constitutionality *vel non* of solitary confinement under conditions similar to those which marked the instant cases, this Court has, at least inferentially, questioned the constitutionality of such confinement.

Second, even though the asserted purpose for imposing the confinement challenged in the instant cases was protective rather than punitive, it is clear that the Eighth Amendment is still applicable to measure the constitutionality of McCray's confinement.

1. Prior Decisions of This Court

This Court has indicated that conditions of solitary confinement similar to those in the instant cases raise substantial constitutional questions. In *Haines v. Kerner,* 404 U.S. 519 (1972), this Court reviewed, *inter alia,* allegations that a state prisoner had been confined in a solitary cell which had a toilet but no other fixture or furnishings, was made to sleep on a concrete floor, and was denied necessary hygienic articles.[86] This Court did

[85] The two tests applied by McCray in the instant cases incorporate all four of the above standards. McCray's first test incorporates the second and fourth standards suggested by Justice Brennan, and McCray's second test incorporates Justice Brennan's first and third standards.

[86] *See* Petitioner's Brief in *Haines v. Kerner,* No. 70-5025, at 5.

not resolve the merits of the controversy but did hold that such allegations state a cause of action and accordingly, reversed the dismissal of the inmate's *pro se* complaint.

Perhaps more relevant is *Brooks v. Florida*, 389 U.S. 413 (1967) where this Court rejected, as involuntary, a state prisoner's confession of criminal conduct because it had been obtained after he had been confined on a limited diet for 14 days without clothes in a Florida prison punishment cell which contained no bed, toilet or other furnishings or external windows: Referring to this strip cell as a "sweat box", "barren cage", and "oppressive hole", the *per curiam* opinion concluded that such confinement constituted "a shocking display of barbarism which should not escape the remedial action of this court". *Id.* at 414-415.

Individual Justices of this Court, speaking for themselves, have also indicated that excessively harsh conditions of confinement can render the use of solitary cells unconstitutional. Three Justices, dissenting from a denial of certiorari in *Sellars v. Beto*, 409 U.S. 968 (1972), reviewed allegations that prisoners were confined in dark cells equipped only with combination toilet-water basins and steel bunks and deprived of other rights[87] and concluded that confinement under such conditions was "shockingly primitive". *Id.* at 968. And, Mr. Justice Douglas, concurring in *Furman v. Georgia*, 408 U.S. 238, 245 (1972), indicated his belief that solitary confinement

[87] Prisoners so confined were also afforded a limited diet, were confined for up to 15 days and denied visits and reading material. However, unlike McCray, those persons were dressed in cloth gowns and allowed to have blankets. *Id.*

may at times constitute "cruel and unusual punishment".[88]

2. The Applicability of the Eighth Amendment

In *Trop v. Dulles*, 356 U.S. 86 (1958), the government argued that denationalization was not a penalty, and therefore, that the protections of the Eighth Amendment were inapplicable. In rejecting this argument, Chief Justice Warren stated:

> "How simple would be the tasks of constituional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them! *Id.* at 94.

Chief Justice Warren went on to observe that "The inquiry must be directed to the substance . . . [since] the basic concept underlying the Eighth Amendment is nothing less than the dignity of man". *Id.* at 95, 100.

Other courts have made it clear that it is the substance of the "treatment" afforded inmates, rather than the asserted motivation for such treatment, that triggers Eighth Amendment review. Accordingly, federal courts have held that the Eighth Amendment is available to review: 1) The treatment of juveniles within institutions intended to rehabilitate, not punish, them, *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974); *Morales v. Turman*, 364 F. Supp. 166, 173 (E.D. Tex. 1973); *Inmates v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972); *Lollis v. New York State Dept. of Social Services*, 322 F. Supp. 473

[88] One of the earlier cases to which Mr. Justice Douglas cited, *In re Medley*, 134 U.S. 160 (1889), discusses the history of solitary confinement, its effects upon prisoners, and the resulting public outcry that, at various times, in various countries, required the cessation of its use. In England, for example, solitary confinement ceased being used in the late 1700's as " 'a further terror and and peculiar mark of infamy' to be added to the punishment of death." 134 U.S. 160, 170.

(S.D.N.Y. 1970); 2) The treatment of persons confined in institutions for the mentally retarded and mentally ill where the justification for confinement is not a punitive one, *Wheeler v. Glass*, 473 F.2d 983 (7th Cir. 1973); *New York State Assoc. for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973); *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974); *Horacek v. Exxon*, 357 F. Supp. 71 (D. Neb. 1973); *Martarella v. Kelly*, 359 F. Supp. 478 (S.D. N.Y. 1973), 3) Conditions of pre-trial detention where punishment is an unacceptable objective, *Rhem v. McGrath*, 326 F. Supp. 681 (S.D.N.Y. 1971); *Hamilton v. Love*, 328 F. Supp. 1182, 1193 (E.D. Ark. 1971); 4) The provision of drug "treatment" to prison inmates, *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973); and 5) The institution of steps to "protect" prisoners, *Sweet v. South Carolina Dept. of Corrections*, F.2d (No. 74-1118, 4th Cir. 1975); *Landman v. Royster*, 333 F. Supp. 621, 646 (E.D. Va. 1971).

The words of then Circuit Judge Stevens, contained in a case reviewing the conditions of confinement in institutions for runaway children, are applicable:

> "Whatever the state does with the child is done in the name of rehabilitation. Since—the argument runs—by definition the treatment is not 'punishment', it obviously cannot be 'cruel and unusual punishment.' But neither the label which the state places on its own conduct, nor even the legitimacy of its motivation, can avoid the applicability of the Federal Constitution. We have no doubt that well-intentioned attempts to rehabilitate a child could, in extreme circumstances, constitute cruel and unusual punishment proscribed by the eighth amendment. *Vann v. Scott*, 467 F.2d 1235, 1240 (7th Cir. 1972)."

These cases support the conclusion of the Fourth Circuit that the humane purposes underlying McCray's

isolation do not remove the prison's actions from Eighth Amendment scrutiny. "[T]he answer is that isolation of McCray occurred within a prison context . . . His confinement, in whole and in part, was punishment for his misdeeds. Thus, all of his confinement was subject to the restrictions of the Eighth Amendment." 516 F.2d at 367.

C. Application of the Proper Standards to the Instant Cases

1. The Conditions Existing in the Solitary Cells and the Process Followed by Petitioners in Imposing These Periods of Confinement Bore No Reasonable Relationship to the Purposes of That Confinement—The Protection of Respondent From Himself—And Were, Therefore, Arbitrarily and Unnecessarily Harsh and Cruel

State action which denies liberty, for however brief a period, must be reasonably related to legitimate state goals. This is a principle inherent in both the proscription of "cruel and unusual punishment", and the guarantee that liberty shall not be denied without due process. "[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).[89] The application of this test to the instant cases supports the Fourth Circuit's decisions.

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[89] *See also McNeil v. Director*, 407 U.S. 245 (1972); *Gilmore v. Lynch*, 319 F. Supp. 105, *aff'd. sub. nom. Younger v. Gilmore*, 404 U.S. 15 (1971). In *Gilmore*, the trial court stated that "prison rules must pass the basic test of due process reasonability, with that test being more or less stringent according to the right taken from the prisoner." *Id.*, at 109, n.6.

(a) McCray v. Burrell

As discussed above, the constitutionality of the confinement of McCray in this case must be measured by analyzing the reasonableness of the means chosen by petitioners to accomplish an admittedly legitimate goal—protection of an inmate from self-destructive acts. The means chosen in this case were unreasonable for several reasons. First, a directive of the Division of Correction, effective August 10, 1970 (see, Addendum to Respondents' Brief; Plaintiff's Exh. 3; App. 186), provides that "An inmate who is displaying mentally disturbed behavior may be placed in an isolation cell for the inmate's own safety, or that of the inmate population, until the psychologist/psychiatrist is notified . . . This directive went on to add that "The psychologist/psychiatrist should be contacted *immediately* after the confinement of the inmate, and the inmate should evaluated within a twenty-four (24) hour period."[90] (Emphasis added). 516 F.2d at 368.

McCray was placed in the mental observation cell at about 9:45 A.M. on January 1st. 516 F.2d at 366. Prior to being placed in the cell he was treated in the dispensary at which time the nurse, purportedly acting in accordance with the written directive mentioned above, contacted a physician and informed him that McCray had been placed in the mental observation cell. That physician told her to communicate this fact to another physician who she was unable to reach. *Id.* at 366-367.

[90] Maryland Division of Correction Policy Directive No. 12-70, effective 8/10/70. This directive also provides for the release of a prisoner from isolation when he "is reasonably calm enough to go to a segregation area without being disruptive."

At no time during McCray's confinement was he seen by a physician, nurse, psychologist, psychiatrist or medical officer of any kind. Nor did petitioner Burrell make any attempt whatsoever to initiate a medical visit for McCray or to obtain compliance with the above directive.[91] The following excerpt from trial transcript containing cross-examination of petitioner Burrell is instructive:

"Q. And what, if anything, thereafter [after placing McCray in mental observation] did you do, was there anything else that you did?

A. I can't remember specifically doing anything particularly after him being checked by the nurse on duty and having been placed in the mental observation unit." App. 172a.

This failure on Burrell's part to comply with the policy was completely arbitrary and unreasonable. While the Fourth Circuit did not require that Burrell *guarantee* that "expert attention would be forthcoming immediately," 516 F.2d at 369, as captain of the day shift (*see* App. 170a-171a, 173a, 179a, 185a), Burrell was responsible for the administration of the whole penitentiary including the control and security of the medical facility within the prison. (*See* App. 186a). Burrell should reasonably have attempted, after placing McCray in the mental observa-

[91] The Fourth Circuit concluded that petitioner Burrell "took steps to comply with the institution's written directive to obtain promptly the services of an expert to evaluate McCray's condition at or about the time that he ordered McCray's special confinement." 516 F.2d at 369. However, the district court's opinion is devoid of such a finding, stating only that "Captain Burrell followed an administrative directive when he confined the plaintiff in the mental observation area. . ." 367 F. Supp. at 1217. The record is silent on why Nurse Weber decided to call a medical doctor after the decision to place McCray in mental observation was made (App. 203a-204a), and contains no evidence whatsoever that Burrell attempted to obtain an expert evaluation of McCray. In fact, the evidence is to the contrary. *See* App. 187a.

tion cell, to obtain expert medical help for McCray as soon as possible. If such help were not forthcoming, it was incumbent upon Burrell to devise other means "to protect McCray from injury to himself other than by continued isolation with deprivation of clothing and elements of personal hygiene."[92] 516 F.2d at 369.

This responsibility for taking some further steps to ameliorate McCray's condition was appropriately Burrell's, not only because of his position, but also because he personally ordered McCray's confinement in mental observation, despite a nurse's suggestion that he remain in the infirmary. Burrell personally decided that it would be necessary, as part of that confinement, to remove McCray's clothing and deny McCray bedding, hygienic articles and all other necessities of life.

The Fourth Circuit, in adopting the policy in the prison regulation, *supra*, as a statement of minimal constitutional standards, did not err as petitioner contends. *See* Petitioners' Brief at 95-96, 99. The policy provides for the reasonable requirement that in instances where inmates are displaying "mentally disturbed behavior" and are placed in isolated confinement with its accompanying harsh conditions (for purposes, *inter alia*, of self-protection), immediate steps must be taken to cope with an admittedly emergency situation.

[92] The confinement of McCray in an isolation cell in the "south wing" area might have been one alternative which would have protected respondent and still allowed him to remain fully clothed and to exercise basic privileges. The continual presence in this area of a correctional officer, at least during the day shift (App. 82a, App. 104a), the time McCray was initially confined in the mental observation cell would have guaranteed his safety. *See* model policies and policies of other jurisdictions, *infra*, for other suggestions on feasible alternatives to the continued nude confinement of McCray in the bare mental observation cell.

Such a policy is consistent with universally suggested operating policy for the administration of similar isolation cells in prisons throughout the country. The standards of the American Correctional Association,[93] for example, require daily medical visits for inmates placed in solitary confinement as does the Model Penal Code.[94] The applicable policy of the Federal Bureau of Prisons provides that:

> "If an inmate is so seriously disturbed that he is likely to destroy his clothing or bedding or create a disturbance which would be seriously detrimental to others, the medical department shall be notified immediately and a regimen of treatment and control instituted with the concurrence of the medical officer."[95]

The policy also requires that "Each segregated inmate shall be seen daily by a member of the medical department and one or more responsible officer[s] . . ."[96]

[93] *See Manual of Correctional Standards*, American Correctional Association (College Park, Maryland) at 419.

[94] *See* §304.7(3), *Model Penal Code, Part III Treatment and Correction* (American Law Institute 1962).

[95] *See* §11(c)(3) Federal Prison System, *Policy Statement No. 7400.5D* (7-7-75) at 19. The policy also provides that "any strip cells which will be utilized will be a part of the medical facility and under the supervision and control of the medical staff." *Id.* at §11(c)(1).

[96] *See* §11(c)(9) at 20.

Other model policies[97] and the regulations of other correctional systems[98] are in accord with the above suggested practices.

The Maryland policy, therefore, contains a "rule of reasonableness", *Jackson v. Indiana, supra*, 406 U.S. at

[97] A handbook published by the National Sheriffs' Association, also recommends that: "The [jail's] medical officer should be notified immediately" if "a seriously disturbed prisoner is placed in segregation", and that "all segregated prisoners should be examined by medical personnel upon being placed in segregation or within twenty-four hours thereafter . . . '*A Handbook on Inmates' Legal Rights*, National Sheriffs' Association (1974) at 28. In another publication of this Association, it is suggested that "special precautions" should be taken in cases of "mental observation prisoners", including, *inter alia*: 1) having a "specially trained officer . . . note the conduct and actions of the prisoner at least once every thirty minutes" and 2) having "the psychiatrist or physician examine the prisoner frequently . . ." *Manual on Jail Administration*, National Sheriffs' Association (1970) at 101-102. And, minimum rules for the treatment of prisoners, promulgated by the United Nations, prescribe that prisoners being punished by "close confinement" "shall" be visited daily by the medical officer. *See Compendium of Model Correctional Legislation and Standards*, American Bar Association and Council of State Governments (hereafter Compendium) at IV-11.

[98] For example, Art. 34, Sec. 529, Maine Rev. Stat. (1975 Supp.) guarantees that "when solitary confinement or segregation exceeds 24 hours, the head of the institution shall cause the institution physician or a member of the institution's medical staff to visit the person forthwith, and at least once in each succeeding 24 hour period in such confinement thereafter, to examine into the state of health of the person". Vol. 7 (Correctional Services) Chapter 6, Part 303 (Segregation Units) of the New York Code of Rules and Regulations provides that "Every inmate confined in a segregation unit shall be visited by the facility health services director or a physician, nurse or physician's associate . . . who shall examine into the inmate's health within 24 hours of the commencement of such confinement and once in every 24 hour period thereafter for the duration of the confinement". *Id* at Part 303.3.

731, that is widely accepted and considered by correctional authorities to be an essential step in avoiding the arbitrary infliction of pain. The requirements of that policy mirror the constitutional requirement which is at the heart of the Eighth and Fourteenth Amendments, *i.e.*, the avoidance of arbitrary and unnecessary suffering. It is this underlying constitutional mandate that was violated by the process and conditions surrounding the confinement of McCray. Because this "rule of reasonableness" underlies the policy, the Fourth Circuit's adoption of the policy as a benchmark of constitutionality is not inappropriate. Nor is the Court's approach a novel one. *See e.g., Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (adopting American Correctional Association standards as an expression of minimally acceptable constitutional conduct); *Jordan v. Fitzharris*, 257 F. Supp. 674, 683 (N.D. Calif. 1966) (*Accord*).[99] Indeed, the Fourth Circuit's action in this regard constitutes a proper deference to the judgment of prison officials. *See e.g., Procunier v. Martinez*, 416 U.S. 396 (1974).[100]

[99] Outside the prison context also, it is not an uncommon judicial technique to attach great weight to standards established by administrators in determining minimum constitutional requirements. See, *e.g., Singleton v. Jackson Municipal Separate School District*, 348 F.2d 729, 731 (5th Cir. 1965); *United States v. Jefferson County Board of Education*, 380 F.2d 385, 390 (5th Cir. 1967), cert. denied 389 U.S. 840 (1967) (HEW Guidelines used to establish minimum standards in school desegregation cases); *United States v. Washington*, 328 A.2d 98, 100 (D.C. Ct App. 1974); *State v. Falcone*, 195 N.W.2d 572, 577 (Minn. 1972) (ABA Standards for Criminal Justice, The Prosecution Function and the Defense Function, Prosecution Function, §§3.1(b) and 3.6(d), used to determine whether the constitutional rights of an accused were violated by the conduct of a prosecutor in a grand jury proceeding.).

[100] *See* Note, *Prison Discipline and the Eighth Amendment: A Psychological Perspective*, 43 U. of Cin. L. Rev. 101, 129-131 (1974) (Suggesting that the adoption, on a case by case basis, of Model Standards as benchmarks of constitutionality gives proper deference to penological expertise and helps assure that minimal constitutional standards are consistent with "the progress of a maturing society.").

The solitary confinement of McCray was arbitrary and unreasonable for another reason. Burrell neither conducted an investigation to confirm his initial, summarily reached conclusion that McCray required such restrictive confinement, nor did he periodically review McCray's condition to see if the *continued* confinement of McCray in the mental observation cell was necessary. The factual premise which supported Burrell's judgment that McCray was dangerous to himself, *i.e.* that McCray had purposefully set the fire in his cell, was therefore never explored. Nor was the possibility that McCray's mental state might well have changed during the time which he was confined in the mental observation cell.[101] Burrell's decision to continue the harsh confinement of McCray was, therefore, not "premised on facts rationally determined," a minimal requirement of due process. In *O'Connor v. Donaldson*, ____ U.S. ____, 95 S. Ct. 2486, 2493 (1975), this Court said: "Nor is it enough that Donaldson's original confinement was founded upon a constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed." (citations omitted). See also, *Sostre v. McGinnis*, *supra*, 442 F.2d at 198 (2nd Cir. 1971). *Accord*, *Wright v. McMann*, 460 F.2d 126, 130 (2nd Cir. 1972); *Ferrall v. Huffman*, 350 F. Supp. 164 (E.D. Va. 1972).[102]

[101] The mandate in Policy Directive No. 12-70 that a prisoner be released from isolation when he "is reasonably calm enough to go to a segregation area without being disruptive", implies some requirement of a continual review and supervision.

[102] In *Wolff v. McDonnell*, *supra*, this Court did not discuss whether the due process procedures required in disciplinary cases would be applicable where the same sanction was used for "protective" reasons. However, this Court did find solitary confinement appropriate "only when it is claimed and proved that there has been a major act of misconduct. Here, as in the case of good-time, there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction." *Id.* at 571, 572 n.19.

Many of the *conditions* existing in the mental observation cell were, like the *process* used to impose such confinement, arbitrary, bearing no relationship to the goal of self-protection. There is no evidence, for example, to indicate that McCray had to be confined naked, denied access (supervised if necessary) to hygienic materials (including soap and toilet paper), toilet facilities, or reading material. Nor is there a basis which could justify the absence of cell cleanliness and the failure to maintain an appropriate temperature in the cell. These conditions did not reasonably advance the goal of self-protection. If McCray had been intent on self-destruction, the unpadded concrete walls of the mental observation cell presented as great an opportunity for self-injury as the possession of the above items.

It is again relevant in assessing the necessity for such deprivations to consult the suggested and actual policies of other correctional authorities and systems. See *Furman v. Georgia*, *supra*, 408 U.S. at 277-278; *Sostre v. McGinnis*, *supra*, 442 F.2d at 192-192. These model[103]

[103] §3 of *An Act To Provide For Minimum Standards For The Protection of Rights of Prisoners*, prepared by the National Council on Crime and Delinquency (1972) provides, for example, that "the cell in which the prisoner is confined in solitary shall be at least as large as other cells . . . shall be adequately lighted during daylight hours. All of the necessities of civilized existence, such as a toilet, bedding, and water for drinking and washing, shall be provided. Normal room temperatures for comfortable living shall be maintained. If any of these necessities are removed temporarily, such removal shall be only to prevent suicide or self-destructive acts, or damage to the cell and its equipment . . . under no circumstances shall a prisoner confined in solitary be deprived of normal prison clothing except for his own protection. If any such deprivation is temporarily necessary, he shall be provided with body clothing and bedding adequate to protect his health." *See* Compendium, n. 29, at IV-54. Similarly, the *Manual of Correctional Standards*, *supra*, n. 20, provides that: "the punitive segregation cell and all cells in it should be evenly heated and adequately lighted and ventilated.

(continued)

and presently effective[104] policies uniformly require the maintenance of necessary cleanliness and temperature

(footnote continued from preceding page)
Artificial ventilation is usually necessary. High sanitary standards should be maintained, bathing facilities should be provided in the section and inmates permitted to bathe frequently." *Id* at 415. See also, *A Handbook On Inmates' Legal Rights*, *supra*, n.24 at 28 ("Prisoners in segregation should be given an opportunity for exercise and should have the same rights to mail and reading matter as other prisoners. Segregated prisoners should be able to maintain the same level of personal hygiene as other prisoners. They should be provided with the same toilet articles and have the same bathing and shaving schedule as the rest of the jail population.").

[104] The Federal Bureau of Prisons requires, for example, that "the quarters used for segregation shall be well ventilated, adequately lighted, appropriately heated and maintained in a sanitary condition at all times." Policy Statement No. 7400.5D (7-7-75), §11(c)(1) at 19. See also, for example, Art. 34, Sec. 529, Maine Rev. Stat. (1975 Supp.), which guarantees the maintenance of "adequate sanitary and other conditions required for the health of the person" confined in solitary or segregation. Chapter 127, Sec. 40 Mass. Gen. Laws Ann. (1974), requires that those prisoners confined in the isolation unit must be provided with "light, ventilation and adequate sanitary facilities . . .". The rules of the New York Prison System require that "the officer in charge of a segregation unit shall take special precautions to see that: a) the highest degree of cleanliness is maintained at all times; . . . e) inmates maintain personal cleanliness; and f) medical attention is furnished when needed . . ." Chapter 6, §303.7, New York Code of Rules and Regulations. The provisions of the New Jersey Administrative Code relevant to the prison system provide that "Administrative segregation is used as close supervision when it is necessary to segregate certain inmates from the general population for *inter alia*, . . . the protection of themselves or others". Such segregation quarters must maintain normal ventilation and room temperature and light of sufficient illumination to allow clear visual observation of the inmates. It is also required that the rooms be kept "clean and sanitary" and that each room contain "a bed and clean mattress" and that "inmates have independent access to toilet facilities". New Jersey Administrative Code, Sub-title F, Sec. 10:35-6.1, 6.4. The relevant rules of the Montana State prison system provide that even "extremely violent or suicidal" prisoners are entitled to blankets, mattresses, shorts, and rubber shower slippers, unless "otherwise specified by a doctor or psychiatrist". In instances where an inmate is suicidal or violent, the judgment to allow or disallow that inmate other personal items is a medical or psychiatric judgment. *See* Montana State Prison Rules and Guidelines.

and the provision of necessary hygienic articles to inmates confined in solitary or isolation cells.

While it might be argued that the denial of clothing and bedding is at least reasonably related to the prevention of suicidal acts such as self-imposed hanging or strangulation (although the use of paper clothing and other similar materials would seem to accomplish the same result), the *complete* denial of such basic items is excessive and unnecessary—a pointless infliction of suffering—in light of the significantly less severe alternatives that allow for the maintenance of some human dignity while achieving prevention of self-destruction.[105]

Without the protections against arbitrariness suggested above there is a substantial chance that the imposition of solitary confinement, even for self-protection, will contribute to, rather than ameliorate, an inmate's disturbed emotional state.[106]

[105] The National Sheriffs' Association *Handbook on Inmate Legal Rights*, for example, provides that "Under no circumstances should a prisoner in segregation be deprived of normal jail clothing except for his own protection. If such deprivation is temporarily necessary, he should be provided with a one-piece garment and bedding adequate to protect his health." *Handbook*, *supra*, n. 24 at 28. The National Council on Crime and Delinquency has suggested model standards which include a similar provision. *See* n. 29, *supra*. *See, e.g. Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971) (Nude confinement of an inmate is appropriate only if approved by a physician).

[106] While "isolation may bring short-term conformity for some, . . . it brings increased disturbances and deeper grained hostility to more." *Manual of Correctional Standards*, *supra*, n. 20, at 413. Empirical evidence indicates that solitary confinement may well result in psychological destruction rather than emotional regeneration. *See Singer, Confining Solitary Confinement: Constitutional Arguments For a "New Penology"*, 56 Ia. L. Rev. 1251, 1264-1272. This Court has recognized this possibility, *see In re Medley*, 134 U.S. 160, 167-8 (1890), and McCray's testimony indicated that this may have been an actuality in his case: "I recall breaking down a couple of times there during the night when I couldn't sleep, twisting, turning, when I would lay on my hand and feel the pain from it, breaking down and crying, not so much because of the pain, but because I just couldn't get anybody to do anything for me at a time that I really needed something done." App. 154a.

(b) McCray v. Smith

McCray contends that his confinement by petitioner Smith in the isolation cell also denied him rights guaranteed by the eighth and fourteenth amendments since the process of imposing such confinement and the conditions of such confinement did not reasonably advance the goal of self-protection. McCray does not quarrel with petitioner Smith's decision to segregate him from the population. However, McCray agrees with the conclusion of the Fourth Circuit that

> "If McCray's mental condition was reasonably believed to be so suspect as to justify the conditions we have described, then it was such as to warrant, if not the actual ministrations of professional personnel, an immediate effort to gain him prompt medical evaluation and necessary treatment." 516 F.2d at 368.

Smith, like Burrell, completely neglected his duty to "immediately" notify, or cause to be notified, the psychologist/psychiatrist at the Maryland Penitentiary after he instituted McCray's isolation. *See* Policy Directive 12-70. As the Fourth Circuit noted "By his own admission, Smith did not seek expert professional help until nearly twenty-four hours after he isolated and stripped McCray". *Id.* In light of the severe and harsh conditions of McCray's confinement and the reasons for said confinement, this failure did, as the Fourth Circuit concluded, reach constitutional proportions. Without the provision of an immediate medical evaluation there can simply be no conclusion that McCray's confinement did not constitute the arbitrary, excessive and unnecessary infliction of pain. *See Furman v. Georgia, supra.*

The conditions of McCray's confinement were also, in several pertinent regards, arbitrarily and unnecessarily

harsh. While McCray's cell did contain a toilet and a sink, his "bed" was a concrete slab, and he was deprived of essential articles of hygiene including "such seemingly innocuous articles as a bar of soap or a toothbrush", 516 F.2d at 368, as well as such essential ingredients of human existence as heat, clothes and blankets. For the reasons discussed above, McCray contends that the denial of these basic necessities was unnecessary[107] and thus, unconstitutional.

2. The Conditions Existing in the Solitary Cells Were Inconsistent With Minimal Concepts of Human Dignity and Evolving Standards of Decency and Are Unacceptable to Contemporary Society.

"The basic concept underlying the eighth amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1968). The treatment of McCray must be measured in this light and by "evolving standards of decency that mark the progress of a maturing society". *Id.* Punishment which is mentally and emotionally traumatic as well as physically cruel is prohibited by the eighth amendment since "the available evidence does not support the . . . conclusion that only torturous punishments were to be outlawed . . .". *Furman v. Georgia, supra*, 408 U.S. at 263.[108]

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[107] The lack of necessity for these deprivations is made apparent in light of the presence, within the isolated confinement area, of a correctional officer, at least during the day shift, an official who could have personally supervised McCray.

[108] *See* also *LaReau v. MacDougall*, 473 F.2d 974 (2nd Cir. 1972), *cert. den.*, 414 U.S. 878 (1973). *See generally*, *Singer, supra*, n.32 at 1273-76 and cases cited therein.

Numerous opinions of circuit[109] and district court[110] judges support the conclusion that the confinement of McCray in the mental observation and isolation cells was in each case, a violation of the eighth amendment. These opinions have applied a "totality of the factors" test, relying, at least in part, on the existence of the following factors to justify the invalidation of such confinement: 1) denial of clothes or bedding to inmate[111] 2) absence in

[109] *See LaReau v. MacDougall, supra; Gates v. Collier,* 501 F.2d 1291 (5th Cir. 1974); *McCray v. Sullivan,* 509 F.2d 1332 (5th Cir. 1975); *Poindexter v. Woodson,* 510 F.2d 464 (10th Cir. 1975); *Knuckles v. Prasse,* 302 F. Supp. 1036 (E.D. Pa. 1969); *aff'd. per curiam,* 435 F.2d 1255 (3rd Cir. 1970), *cert. den.*, 403 U.S. 936 (1971); *Wright v. McMann,* 460 F.2d 126 (2nd Cir. 1972); *Anderson v. Nosser,* 438 F.2d 183 (5th Cir. 1971), reh. *en banc* modifying earlier decision, 456 F.2d 835 (1972); *Black v. Brown,* 513 F.2d 652 (7th Cir. 1975); *Finney v. Arkansas Board of Correction,* 505 F.2d 194 (8th Cir. 1974).

[110] *See, e.g., Jordan v. Fitzharris,* 257 F. Supp. 674 (N.D. Calif. 1966); *Hancock v. Avery,* 301 F. Supp. 786 (M.D. Tenn. 1969); *Landman v. Royster,* 333 F. Supp. 621 (E.D. Va. 1971); *Kelly v. Brewer,* 378 F. Supp. 447 (S.D. Ia. 1974); *Negron v. Preiser,* 382 F. Supp. 535 (S.D.N.Y. 1974); *Osborn v. Manson,* 359 F. Supp. 1107 (D. Conn. 1973); *Holt v. Sarver,* 300 F. Supp. 825 (E.D. Ark. 1969), 309 F. Supp. 362, *aff'd.* 442 F.2d 404 (8th Cir. 1971); *Allen v. Nelson,* 354 F. Supp. 505 (N.D. Calif. 1973). *See also, Lollis v. New York State Dept. of Social Services,* 322 F. Supp. 473 (S.D.N.Y. 1970); *Williams v. Wainwright,* 350 F. Supp. 333 (M.D. Fla. 1972) (consent decree); *Goldsby v. Carnes,* 365 F. Supp. 395 (W.D. Mo. 1973) (consent decree); *Jones v. Wittenberg,* 330 F. Supp. 707 (N.D. Ohio 1971); *Campise v. Hamilton,* 328 F. Supp. 172 (S.D. Tex. 1974); *Inmates v. Affleck,* 346 F. Supp. 1354 (D.R. 1972); *Morales v. Turman,* 364 F. Supp. 166 (E.D. Tex. 1973).

[111] *Poindexter v. Woodson, supra; Gates v. Collier, supra; Wright v. McMann, supra; Knuckles v. Prasse, supra; Black v. Brown, supra; Kelly v. Brewer, supra; Negron v. Preiser, supra; Hancock v. Avery, supra; Jordan v. Fitzharris, supra; Landman v. Royster, supra.*

the cell of adequate toilet facilities and other furnishings,[112] 3) unsanitary and unclean cell conditions,[113] 4) inadequate heat,[114] 5) denial of regular medical visits,[115] and 6) denial of a daily opportunity to exercise outside the cell.[116]

In *Burrell,* McCray was denied all these "basic necessities of human existence." *Finney v. Ark. Bd. of Correction, supra* at 207. His confinement in *Smith* was, with the exception of the denial of a toilet and sink and the provision of an old and deteriorated mattress, similarly brutal and dehumanizing.[117]

[112] *Gates v. Collier, supra; LaReau v. McDougall, supra; Poindexter v. Woodson, supra; Knuckles v. Prasse, supra; Hancock v. Avery, supra; Jordan v. Fitzharris, supra.*

[113] *Gates v. Collier, supra; Poindexter v. Woodson, supra; Black v. Brown, supra; Knuckles v. Prasse, supra; Wright v. McMann, supra; Hancock v. Avery, supra; Jordan v. Fitzharris, supra; Kelly v. Brewer, supra; Negron v. Preiser, supra; Landman v. Royster, supra; Holt v. Sarver, supra.*

[114] *See, e.g., Wright v. McMann, supra; Landman v. Royster, supra.*

[115] *See, e.g., Landman v. Royster, supra; Williams v. Wainwright, supra; Jones v. Wittenberg, supra.*

[116] *Osborn v. Manson, supra; Bauer v. Sielaff,* 372 F. Supp. 1104 (E.D. Pa. 1974).

[117] McCray does not share the conclusion of the Fourth Circuit that the conditions of confinement in *McCray v. Smith,* come *only* "perilously close to a denial of eight amendment rights", 516 F. 2d at 368. Although the provision of a toilet and sink places this confinement a step above the confinement suffered by McCray in *Burrell,* the denial of clothes and adequate bedding, denial of necessary hygienic articles, and the failure to maintain adequate temperature within the cell do bring this confinement within the scope of many of the above-cited cases. *See, e.g., Finney v. Ark. Bd. of Correction, supra; Holt v. Sarver, supra; Knuckles v. Prasse, supra; Wright v. McMann supra; Black v. Brown, supra; Landman v. Royster, supra; Lollis v. N.Y. State Dept. of Soc. Serv., supra; Inmates v. Affleck, supra.*

The fact that the duration of McCray's confinement under these conditions was in each case, approximately two days and not longer, presents no constitutional justification for such confinement. *See Gates v. Collier, supra,* (48 to 72 hours in solitary confinement held unconstitutional); *Knuckles v. Prasse, supra,* (2½ days in solitary found to be unconstitutional); *Hancock v. Avery, supra,* (Solitary "confinement under the conditions of harshness and cruelty reflected by the present record should not be tolerated for any length of time, however brief"). Nor is the prevention of self-destructive acts, *Hancock v. Avery, supra; Jordan v. Fitzharris, supra; Negron v. Preiser, supra,* or the protection of others, *see, e.g., Kelly v. Brewer, supra,* or the prevention of escape, *see e.g., Hancock v. Avery, supra,* a justification for confinement under such conditions.

The holding of these and similar cases is that whatever the provocation, dehumanizing and degrading conditions such as those suffered by respondent cannot be constitutionally justified. The policies and practices discussed above, condemning many of the conditions incident to McCray's confinement, provide objective indicators that such confinement is "unacceptable to contemporary society". *Furman v. Georgia, supra,* 408 U.S. at 277. The history of the use of such confinement is, like the comparable history of the use of the death penalty, "one of successive restriction."[118] *Furman v. Georgia, supra,* 408 U.S. at 299. Indeed, the decision of the Maryland Department of Public Safety, in 1974, to permanently close the unit containing the mental observation cells and to discontinue their use[119] is consistent with this history

[118] *Compare In re Medley, supra,* with the material in footnotes 97-105.

[119] See, Respondents' brief in opposition to the petition for certiorari at 22.

of successive restriction, further indicating the lack of necessity for such confinement and the inconsistency between such confinement and "evolving standards of decency". *Trop v. Dulles, supra,* 356 U.S. at 100-01.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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Attorneys for Respondents

APPENDUM A

LEE AVON JOHNSON	*	NO. 9934 LAW DOCKET 16
VS.	*	IN THE CIRCUIT COURT
ROBERT J. LALLY	*	FOR WASHINGTON COUNTY

* * * * * * * * *

JAMES O. TULL	*	NO. 097185, PAGE 137
VS.	*	IN THE BALTIMORE CITY
ROBERT J. LALLY	*	COURT

* * * * * * * * *

CHARLES H. TAYLOR	*	NO. A-7386
VS.	*	IN THE CIRCUIT COURT
ROBERT J. LALLY	*	FOR HOWARD COUNTY

* * * * * * * * *

ORDER OF COURT

The matter of the consolidated appeals from Decisions of the Secretary of Public Safety and Correctional Services having come before the Court for hearing, and after hearing argument of counsel, and in accordance with the Memorandum Opinion filed herein,

IT IS HEREBY ORDERED, This 28th day of January, A.D. 1976, that the Decision of the Secretary of Department of Public Safety and Correctional Services in each of these three cases be and the same is hereby affirmed.

/s/Paul Ottinger,
Paul Ottinger,
Associate Judge

MEMORANDUM OPINION

JOHNSON CASE:

Appellant was transferred from the Maryland Correctional Institution in Washington County to the Maryland Penitentiary in Baltimore on March 3, 1975 to have x-rays taken. He was instructed to undress and leave his clothes in an adjacent room. When Appellant returned to this room, after the x-rays were taken, he alleges that he saw another prisoner named Durrell Shelton leaving the area with the leather coat and that he (the Appellant) notified a Correctional Officer named Reginald Johnson, who allegedly was at the scene. It is further alleged that Shelton was not apprehended and that he was permitted by the authorities to leave the area. The coat was not recovered.

Appellant filed a Petition with the Maryland Inmate Grievance Commission requesting the return of his coat or compensation in the amount of $115.00, charging that the coat was lost as a result of the negligent conduct of the prison officials.

After the hearing, the Commission found that the coat was in fact lost as a result of the negligence of the employees of the Penitentiary and recommended that the Appellant be reimbursed in the amount of $115.00 The Secretary of Public Safety and Correctional Services reversed the decision of the Commission and held that:

> ". . . it is our opinion that neither the Inmate Grievance Commission nor the Secretary of the Department of Public Safety and Correctional Services has the authority to award money damages in a complaint of negligence by an inmate against the officers or employees of the Division of Correction or Patuxent Institution. . . ."

TULL CASE:

On March 13, 1974, this Appellant was placed in isolation at the Penitentiary for allegedly being in possession of fermented juices at which time he gave two rings to a Lt. Kane. The Institution stipulated that Tull had two rings and that only one of them was returned to him when he was released from segregation on April 19, 1974. The missing ring had not been registered with the Institution as required by regulation and therefore there was no description of it or statement of its value among the records of the Penitentiary. The Inmate Grievance Commission found that the ring was lost because of the negligence of an employee and that the Institution must be responsible. One of the difficulties of this case arose from the fact that the Appellant claimed that the missing ring was worth more than $1,000.00, but the Commission found that a fair market value would be $150.00 and that the Institution should pay Tull this amount.

The Secretary reversed the decision of the Commission in this case also on the same ground as in the Johnson case.

TAYLOR CASE:

This Appellant arrived at Patuxent Institution on January 30, 1974 with several boxes of personal property. On or about June 13th of that year, Taylor was apparently relocated within the Institution and his personal property was brought to him by a Correctional Officer. The Appellant claimed that some of his property was missing. Taylor claimed $176.31 as the value of the missing property and the Commission did find in his favor, but allowed him only $24.00 as the value of three

sport shirts which the Commission decided had in fact been lost. The Commission found in this case also that the property was lost because of the negligence of the employees of the Institution.

The Secretary reversed the decision of the Commission in this case also on the same ground as in the Johnson case.

These cases were ordered consolidated for hearing and this Judge was designated to sit in all three cases by Chief Judge Robert C. Murphy dated November 13, 1975.

The issue before this Court is whether the State Correctional Institutions are liable for money damages arising out of the loss of an inmate's personal property entrusted to the Institution where he is confined.

It is well established in Maryland that the State cannot be sued without its consent, unless specific legislative authority has been given and, even so, if there are no funds available for the satisfaction of the judgment, or no power reposed in the agency for the raising of funds necessary to satisfy a recovery against it. *University of Maryland v. Maas*, 1973 Md. 554.

> *Artic 41, Section 204F(d)* states: "Any person confined to an institution within the Division of Correction, or otherwise in the custody of the Commissioner of Correction, or confined to the Patuxent Institution, who has any grievance or complaint against any officials or employees of the Division of Correction or the Patuxent Institution, may submit such grievance or complaint to the Inmate Grievance Commission within such time and in such manner as prescribed by regulations promulgated by the Commission."

This language seems to be broad enough to cover the complaints before the Court. However, Sections (a) and (b) provides that the members of the Inmate Grievance

Commission and its employees may be compensated "as provided in the budget".

> *Section (f)(2)* of *Article 41, Section 204F* provides that: "However, if after the hearing, the Commission in its order finds that the inmate's complaint was in whole or in part meritorious, such order shall be promptly forwarded to the Secretary of Public Safety and Correctional Services. Within fifteen days of the receipt of such an order, the Secretary by order shall affirm the order of the Commission, or shall reverse or modify the order where he disagrees with the findings and conclusions of the Commission. The Secretary shall order that the appropriate official of the institution in question accept in whole or in part the recommendation of the Commission or the Secretary may take whatever action he deems appropriate in light of the Commission's findings."

There is no reference here to awarding money damages.

At the hearing before this Court, the Attorney for the Appellants, conceded that the argument of the Attorney General that the Inmate Grievance Commission was not authorized by this Statute to order the Department of Correction to pay money damages in such cases was sound; but he argued that the Commission was authorized to order the particular Correctional Officer or other employee of the institution to pay damages for property lost because of the negligence of such employee. There is nothing in the Statute which would authorize any such result because, of course, the determination of losses caused by the negligence of a bailee also is the function of the civil courts of this State.

The Attorney for the Appellants also stated during the argument that the Attorney General had taken the position, in a case now pending before the Supreme

Court, that the Inmate Grievance Commission Law gave these Appellants an adequate remedy in cases such as this. The Attorney General admitted that he had taken such a position but averred that this was an error.

The Statute establishing the Inmate Grievance Commission seems to give that Commission, and the reviewing Courts, powers comparable to those exercised in equity and was intended to authorize the Commission and the Secretary to order the officials and the institutions in the correctional system to cease practices which infringed on constitutional rights. *McCray v. Burrell*, 367 F. Supp. 1191.

This Court finds that the State of Maryland has not taken any legislative action which would waive its governmental immunity in cases such as this. Specifically, the Court finds that the Inmate Grievance Commission Act does not authorize suits against the Correctional Institutions for money damages.

The Court finds further that the doctrine of governmental immunity may not be evaded by filing an action against an officer or an employee of the State as was suggested by the Attorney for the Appellants when these cases were argued. *Stanley v. Mellor*, 168 Md. 465, *Red Star Line v. Baughman*, 153 Md. 607.

This Court finds that the Secretary of Public Safety and Correctional Services was not in error when he reversed the decision of the Inmate Grievance Commission in these three cases.

Section (1) of *Section 204F* of *Article 41*, restricts this court's review to a determination of whether there was a violation of any right of the inmate protected by federal or State laws or constitutional requirements; and this Court finds that there was no such violation in any of these cases.

/s/Paul Ottinger.
Paul Ottinger,
Associate Judge

Dated: January 28, 1976.

ADDENDUM B

35.
PRETRIAL PROCEDURE

(a) In any action the Court may in its discretion direct the attorneys for the parties to appear before it for a pretrial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure. Unless otherwise ordered, all pretrial conferences shall be held before a judge in open court or in chambers and an official court reporter may be present. At least one of the attorneys for each of the parties, who will actually participate in the trial shall appear at and conduct the pretrial conference. Each attorney shall be familiar with all aspects of his case before the pretrial conference, and if necessary, shall obtain prior authority from his client to enter into stipulations with reference to as many facts and issues as practicable. If an attorney for a party fails to appear at a pretrial conference, or otherwise fails to abide by the requirements of this rule, the judge may take such action, including the impositions of sanctions, as he may deem appropriate.

(b) Upon the designation of a case for pretrial conference, the Court or Clerk shall mail or otherwise deliver a "Notice of Pretrial conference" to the attorneys of record, giving them at least twenty days' notice of the place and date of the conference; such notice need be furnished only to Maryland counsel unless a judge shall otherwise order. The notice shall direct that plaintiff's attorney shall file in the chambers of the judge not later than five (5) days before the conference, a proposed pretrial order signed by the attorneys for all parties in the event they can agree. The proposed pretrial order shall be

drafted by the attorney for the plaintiff and submitted to all other parties in the case for review, revisions, and execution. If counsel are unable to agree upon any particular provision of the proposed pretrial order, counsel for each party shall instead submit by that date a draft of his proposal for said provision with the proposed pretrial order. The proposed pretrial order shall contain at least the following:

1. A brief statement of facts that each plaintiff proposes to prove in support of a claim.
2. A brief statement of facts that each defendant proposes to prove or rely upon as a defense thereto.
3. Similar statements as to any counterclaim, crossclaim, or third-party claim.
4. Any amendments required of the pleadings.
5. Any issue in the pleadings that is to be abandoned.
6. Stipulations of fact or, if unable to agree, a statement of matters on which any party requests an admission.
7. The details of the damage claimed or any other relief sought as of the date of the pretrial conference.
8. A listing of the documents and records to be offered in evidence by each side at the trial other than those expected to be used solely for impeachment indicating which documents the parties agree may be offered in evidence without the usual authentication.
9. A listing for each party of the names and specialties of experts the party proposes to call as witnesses.
10. Any other pretrial relief which an attorney will request.

The notice shall further state that the attorneys are required to complete prior to the date of the pretrial conference all discovery provided for in Rules 26-37 of the Federal Rules of Civil Procedure.

(c) The matter of a settlement may be discussed at the pretrial conference but the discussion shall not be made part of the Court record and shall not be mentioned in the proposed pretrial order, at the trial or in any motions or arguments.

(d) The judge may enter a pretrial order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of attorneys; and such order when entered shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

ADDENDUM C

ADMINISTRATIVE PROCEDURE ACT

§ 244. Definitions.

For the purpose of this subtitle:

(a) "*Agency*" means any State board, commission, department or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches, and except the Department of Parole and Probation, the Workmen's Compensation Commission, the State Accident Fund, the State Insurance Department of Maryland, the Public Service Commission, the Employment Security Board and the State Tax Commission.

(b) "*Rule*" includes every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations concerning only the internal management of the agency and not directly affecting the rights of or procedures available to the public.

(c) "*Contested case*" means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.

§ 251. Contested cases—Notice; hearing; records.

In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. The

notice shall state the time, place and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present evidence and argument with respect thereto. The agency shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe shorthand notes unless requested for purposes of rehearing or court review. Informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order, or default. Each agency shall adopt appropriate rules of procedure for notice and hearing in contested cases.

§ 252. Same—Rules of evidence; official notice.

In contested cases:

(a) Agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable and prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.

(b) All evidence, including records and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(c) Every party shall have the right of cross-examination of the witnesses who testify, and shall have the right to submit rebuttal evidence.

(d) Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence and specialized knowledge in the evaluation of the evidence presented to them.

§ 253. Same—Examination of evidence by agency.

Whenever in a contested case, a majority of the officials of the agency who are to render the final decision have not heard the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision, including findings of fact and conclusions of law, has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties.

§ 254. Same—Decisions and orders.

Every decision and order adverse to a party to the proceedings, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. A

copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed promptly to each party or to his attorney of record.

§ 255. Same—Judicial review.

(a) *Right to review.*—Any party aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in fact, is entitled to judicial review thereof under this subtitle.

(b) *Where proceedings instituted; intervening parties.*—Proceedings for review shall be instituted in the circuit court of the county or in the Baltimore City Court, as the case may be, either where any party resides or has his or its principal place of business. The court, in its discretion, may permit other interested persons to intervene.

(c) *Stay of enforcement of decision.*—Repealed by Acts 1962, ch. 36, § 1.

(d) *Transmission of record.*—Repealed by Acts 1962, ch. 36, § 1.

(e) *Additional evidence.*—If, before the date set for hearing, application is made to the court for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken in open court or before the agency upon such conditions as the court deems proper. In cases in which the additional evidence is taken before the agency, it may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(f) *Heard without a jury: testimony, oral argument and written briefs.*—The review shall be conducted by the court without a jury. In cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

(g) *Affirmance, remand, reversal or modification of decision.*—The court may affirm the decision of the agency or remand the case of further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or

(6) Against the weight of competent, material and substantial evidence in view of the entire record, as submitted by the agency and including de novo evidence taken in open court; or

(7) Unsupported by the entire record, as submitted by the agency and including de novo evidence taken in open court; or

(8) Arbitrary or capricious.

ADDENDUM D

STATE OF MARYLAND
INMATE GRIEVANCE COMMISSION

ORDER

In the matter of: William Bryant
#129669, Maryland Penitentiary IGC No. 3599

The above named inmate wrote to the Inmate Grievance Commission on July 22, 1975 stating that on July 11, 1975 he was convicted by an Adjustment Team at the Maryland Penitentiary of possession of contraband (fermented juices), sometimes known as "jump steady", for which he was sentenced to thirty days segregation, concurrent to other sentences then being served in segregation, totaling two years. He claims he was not guilty because the claimed contraband was, in fact, orange juice; that the evidence before the Team was insufficient to justify a conviction and that the claimed "jump steady" was not produced at the adjustment hearing, having been destroyed by the institution prior to July 11, 1975.

On September 10, 1975 Chairman Boss, along with Commissioners Bennett, Fulton and Williams heard this case at the Penitentiary. Mr. Bryant was present with his inmate counsel, Fred "Jake" Hutchinson, and the institution was represented by Captain S. Rossman, CID. The Adjustment Team was represented by Mr. Ronald Woodwood, Classification Counselor III.

Findings of Fact

It is found that on July 10, 1975, about 9:25 a.m., Mr. Michael A. Cusick, CO I, was on duty on the South Wing of the Maryland Penitentiary and had been sent to the fourth tier to investigate a fire in the area of cell D-440, then occupied by inmate William Bryant. With Mr. Cusick was Officer A. Johnson, CO III, who had also been assigned by Sgt. Carpenter to investigate the fire.

According to separate adjustment reports filed by Officers Cusick and Johnson, they both smelled the odor of fermented juices emanating from cell D-440 and upon entering the cell they found approximately one-half gallon of what they believed from experience to be fermented juices in a bucket. Inmate Bryant was in the cell at that time and when questioned by Officer Johnson as to whether or not he had a fire behind the back plate in his cell, Mr. Bryant is reported to have replied that he was burning paper, rolled toilet tissue, to keep mosquitoes, etc. out of his cell.

Following confiscation of the suspected contraband, Officers Johnson and Cusick charged inmate Bryant with violation of Rule 7 which is stated in the Inmate Rule Book (June 1973) to include, in addition to intoxication, etc., the possession of fermented juices.

The Adjustment Team found Mr. Bryant guilty as charged, by unanimous vote, and based its finding on the officers' statements relating to their observations, detection and identification of the suspected contraband, even though, it is admitted, the evidence had been destroyed following its identification as "jump steady". Captain Rossman asserted that, as to "jump steady", the normal custom is to destroy it after identification, contrasted to the practice of retaining as evidence such suspected

contraband as marijuana, hard drugs, commercial liquors, etc., which are usually tested out by outside laboratory experts.

Mr. Ronald Woodward, a member of the Adjustment Team, told the Commission that at the adjustment hearing Officer Johnson told the Team that the juices were destroyed only after same were shown to Sgt. Stanton and had been identified as "jump steady" by Officers Cusick and Johnson.

In his defense before the Commission, inmate Bryant admitted having lighted some toilet tissue, in torch form, to keep off mosquitoes, bugs and roaches, but denied that the claimed contraband was "jump steady", stating that it was orange juice. However, Mr. Bryant failed to explain why so much orange juice was in his cell and why it was kept in a bucket. Through counsel, it was claimed that the destruction of the juices effectively deprived him of an important element of defense; i.e., the production of the claimed contraband as evidence at his adjustment hearing. Mr. Bryant also claimed he did not have available to him in his cell the fermenting agent(s) necessary to convert the orange juice to "jump steady", prison argot for fermented juices.

Counsel Hutchinson claimed that the accusing officers were not proven to be experts qualified to definitively identify the juices as "jump steady" and that in the absence of scientific proof, his client should not have been convicted.

CONCLUSIONS

The Commission concludes that the evidence before it was not sufficient to sustain complainant's contention

that his conviction should be reversed and relief granted; i.e., expungement from his base file. Although the Commission finds in this case the possible question as to justification of the charge, we do find that preservation of the evidence is not required in order to try the case and to convict on the testimony of the accusing officers. For this reason we conclude that a reversal by the Commission is not justified in this case. However, the Commission includes herein a strong recommendation that the institution should review its procedures in order to assure that identification of suspected contraband, such as fermented juices, be required by at least one qualified and experienced officer in addition to the accusing officer(s), whether or not the suspected contraband is to be retained as evidence or whether destroyed following identification.

DISPOSITION

Having found the grievance of inmate William Bryant to be lacking in merit, the Commission orders this case dismissed this 29th day of September, 1975.

/s/ James G. Boss
James G. Boss, Chairman

/s/James V. Bennett
James V. Bennett, Commissioner

/s/E. A. Fulton
E. A. Fulton, Commissioner

/s/Maceo M. Williams
Maceo M. Williams, Commissioner

STATE OF MARYLAND
INMATE GRIEVANCE COMMISSION

In the matter of: I.G.C. No. 3599 - William Bryant, 129669 Maryland Penitentiary

Bennett, J. V. - In Dissent

This matter came before four members of Maryland's Inmate Grievance Commission on September 10, 1975. The record notes that one of the members must go unpaid because of the budget crisis facing Governor Mandel.

The purpose of the hearing was to determine whether prisoner William Bryant had been denied his constitutional right of due process of law, confrontation of witnesses, and other fifth and fourteenth amendment rights when he was found guilty of possession of one quart of "jump-steady".

Three members of the Commission found the grievance lacking in merit and ordered the case dismissed. This member was erroneously listed as concurring in the result. This was apparently due, in part, to the fact there was, as usual, no discussion of the case among the members prior to the drafting of the order and also to the general confusion, din, and noise surrounding the proceedings.

The hearing was held in a basement room that had been scooped out during the construction of the Maryland Penitentiary when it was ceremoniously opened in 1804. It was then described as a sure deterrent to crime and a response to the influence of the Quakers and the growing humanitarianism of the times as a replacement for the whipping-post, the stocks, and the pillories, which

had failed to stop horse-stealing, adultery, the slothfulness and flight of indentured servants, crimes against nature, and wife-beating.[1]

Mr. Bryant was ushered into the room accompanied by his inmate counsel and before the Commission who were seated on rickety chairs of different heights squeezed behind a desk and table used ordinarily for a guard supervisor. This official was transferred to a corner of the room to answer a constantly ringing telephone, pass out messages and orders, and attend the coffee maker.

The door from the hallway opened frequently to allow some officer to leave a message or ask a question of the Captain of the Guard a Mr. I. Rossman, who was delegated to represent the institution in the proceedings.

These intrusions swept in a cacophony of noises, clanging barred doors, loud shouts, and frequent bangs which interfered with the tape recorder and from time to time required a cessation of proceedings.

The Chairman, James G. Boss, Esq., directed the aggrieved inmate, wearing a non-descript coverall, a hat denoting his membership in one of the Muslim groups, and his counsel, who was more fittingly garbed for the proceedings in jeans and a sweatshirt to take seats. The inmate counsel greeted the Commission members, all of whom he knew, with a pleasant smile and sat down beside his client after a dutiful nod to the Captain of the Guard. No love lost there, obviously. The Chairman introduced the members of the Commission and directed the petitioner to state his case.

[1] It is the recollection of the writer that not until the late and compassionate Governor Theodore McKeldon commuted the sentence of a Frederick, Maryland man to twenty lashes "well laid on" for wifebeating that the whipping post of colonial days was finally abolished.

A preliminary look at Mr. Bryant's institutional record disclosed that while he was serving a life term at the Maryland House of Correction, he had "walked away" while working in an outside warehouse. When he was recaptured, he was transferred to the penitentiary where he was sentenced to two years in solitary confinement in the prison's South Wing for escape. It is this section of the institution that confines inmates segregated for disciplinary infractions, self-protection, or because of "adjustment" problems. It has several times been the cause of inmate suits charging conditions are violative of the eighth amendment to the U.S. Constitution prohibiting cruel and unusual punishment, because of its lack of proper lighting, hot water in the cells, exercise facilities, screening, and ventilation. It has been found unsuitable for the incarceration of prisoners held in protective custody. No action, however, has been taken on a pending federal court suit declaring its use for any purpose as constituting cruel and unusual punishment.

On July 10, 1975, Mr. Bryant testified, he had lit a cigarette-size piece of toilet paper and stuck it in the chain that holds his hinged steel-bottomed bed to the wall. He did this he said to drive out the mosquitoes, gnats, and sundry other bugs that were viciously attacking him on a day when the outside temperature was in the nineties. Such fumigating devices were apparently not unusual and often tolerated by the Officer in Charge but, on this occasion, it created such a smudge that Bryant's cell neighbors shouted for relief. Thereupon one of the officers on duty heard the commotion above the usual yelling and banging in the 240-man cell block and sweated his way up three flights of stairs to where the petitioner was trying to shout his justification for the fumigation. The officer apparently was not impressed and

opened the cell door and doused the smudge. He incidentally also looked about and "shook down" the cluttered cell. In the process, he found a two-quart container half-full of something that was alleged to be orange juice. But the officer, having breathed in some of its aroma, decided it was fermented and confiscated it. As duty required, a report was filed with the disciplinary committee charging Bryant with being in possession of "fermented juices". He was found guilty and given thirty days confinement in segregation to run concurrently with the two-year sentence he was serving for escape.

Bryant's counsel thereupon stroked his beard and demanded the charge be expunged because the evidence was not produced at the disciplinary trial and his client was therefore obviously denied due process. Moreover, he contended that there was no proof the juice was fermented and could not, in fact, by any stretch of the imagination, be "jump-steady". Furthermore, it was violative of the Constitution's self-incrimination rule, the Miranda Rule, and the unreasonable search and seizure clause. He had apparently read or been fully briefed on the U.S. Supreme Court opinion in *Wolff vs. McDonnell* decided on June 26, 1974.[2]

The Chairman, after an unsuccessful attempt to brush aside the Constitutional arguments, called upon the Captain of the Guard, Mr. Rossman, to explain how the officer who filed the charge knew it was fermented and was, in fact, "jump-steady". The Captain insisted that any experienced and trained officer could determine this

[2] This decision indicated that prison inmates charged with serious misconduct required certain due process protection whenever penalties could be imposed resulting in forfeiture of credits; confinement in a disciplinary cell; administrative segregation; or any action which would tend to affect the inmate's release or parole date or have a bearing on a major change in the condition of confinement." (418 U.S. 539).

by its odor. He responded heatedly to a question whether the charging officer had tasted it.

> "No, of course he did not taste it. That might be dangerous. Just as anyone can tell whiskey good or bad by the smell so could an experienced officer, detect "jump-steady" by the odor."

What about vodka someone asked when the recorder was off while the noise in the corridor subsided.

When the hearing was resumed, the classification counselor, Mr. Ronald Woodward, who presided at the disciplinary hearing, was called upon to testify. He agreed he had accepted the words of the officer that the juice was fermented and therefore "jump-steady". "No", they had not taken into account any extenuating circumstances, the weather, or the fact that the petitioner had been let out of his cell for exercise only about a half-hour each week and then only to take a shower.

It was contended by the institution that even though suspected contraband is usually retained as evidence in such cases, it was not on this occasion because of its odor and lack of space to store it. Moreover, it was suggested the penalty was for only 30 days and made to run concurrent with his two-year segregation sentence. This seemed to arouse Mr. Bryant who contended vociferously he wanted the charge "expunged", taken off his record so possibly he could some day apply for parole. He did not want it to appear he had broken a rule, was addicted to strong drink, or did not know how to do time.

Moreover, Mr. Bryant's counsel contended the essential issue was "minimum due process" and that the disciplinary court had acted arbitrarily and capriciously and failed to comply with the uniform rules of evidence as lately promulgated by the U.S. Supreme Court.

After a few questions about the size of the vermin and the rats in the South Wing, to which the Captain of the Guards strenuously objected and caused the Chairman to shut off the tape recorder, the hearing was resumed and the Captain again was asked whether the officers were experts and how long the fermentation process had to proceed before it became contraband "jump-steady".

The Captain would not speculate on how much fermentation time was required but vowed: "Once you smell "jump-steady" you never forget it."

Mr. Bryant's counsel protested again this was not admissible evidence or proof, merely opinion, and besides even this was hearsay and threatened he was going to appeal the whole case to the Federal judge who had been petitioned to find confinement in the South Wing cruel and unusual punishment.

Thereupon, the Chairman concluded the Hearing and left for another engagement without discussing the case or his conclusions.

CONCLUSIONS

This member of the Commission cannot agree Mr. Bryant's petition is wholly without merit. The prisoners in the grim and stiflingly hot South Wing of the penitentiary in mid-summer are served their food in their 5′ x 8′ cells and are permitted to retain portions. They are also permitted to purchase items from the canteen including oranges and similar items when available and can consume these in whatever form they please. We have only the word of the officers that the orange juice Mr. Bryant had made was fermented – was, in fact, "jump-steady" of "proper proof". The officer making the charge was not called and no attempt was made to determine

customary habits of the inmates in this section of the prison or Mr. Bryant's usual behavior. He must have been cooperative at one time or he would not have been given a minimum custody assignment at the House of Correction. His alleged offense must be viewed in the light of the fact that he, a life-termer, had been given a two-year sentence to segregation in the South Wing for escape. He was not taken into court and charged with escape presumably because his life term could not be extended so he was committed to the South Wing as a deterrent to others who might attempt to escape. That he sought some surcease or relief from the conditions under which he was held is understandable and his eagerness to maintain a clear record commendable.

If the Grievance Commission is to fulfill the objectives the legislature had in mind of relieving tensions in Maryland's penal system and ameliorating harsh and unreasonable conditions and penalties, it must place the burden of proof on those who make the charges. Moreover, it must insist upon fairness in the disciplinary process wherever it comes to its attention. The voice of conscience, good sense, and understanding in correctional policies has long since progressed beyond the findings in *McCloskey vs. Maryland* which opined that:

> (337 Fed. 2nd 72) "In the gread mass of instances, however, the necessity for effective disciplinary controls is so compelling that judicial review of them is highly impractical and wholly unwarranted."

This and the long prevailing "hands-off" doctrine in dealing with penal policies has been repudiated by other federal courts and by the Supreme Court in *Wolff vs. McDonnell* previously cited. It has also been interred by a most exhaustive and persuasive opinion by Chief Justice

Richard Hughes of the New Jersey Supreme Court in Avant, et al vs. Commissioner of N.J. Department of Institutions and Agencies, decided June 23, 1975.

Also, it is well to remember that the accumulation of minor irritants, inflexible policies, and whimsical "straining at gnats" that are often the root cause of explosions in institutions filled with idle, hostile men trapped by circumstances beyond their control.

Also, it must not be forgotten that the responsibilities of the Commission and its jurisdiction is still unclear. Whether all cases alleging arbitrary and capricious action must first be brought before the Commission and all other state remedies exhausted before an action can be filed in Federal court has not yet been finally determined by the U.S. Supreme Court. It would seem, therefore, this case should have been more carefully investigated by the Commission on its own initiative, witnesses called if necessary, and full discussion of the issues encouraged. See McCray vs. Burrell (17 Criminal Law Reporter 2108).

The Commission cannot fail to recognize this situation or acquiesce in hasty "rule-book" actions and fulfill its responsibilities. Mr. Chief Justice Burger who has personally visited the Maryland Penitentiary has given life to the importance of this approach.

> "What I have been trying to express is my conviction that when society places a person behind walls we assume a collective moral responsibility to try to change and help that person. The law will define duties but I have more faith in what a moral commitment . . . can accomplish than I have in what can be done by compulsion of judicial decrees."[5]

[5] Address to National Conference on Corrections–December 1971.

DISPOSITION

It is our duty to expunge the Disciplinary Board's action in this case and undertake to right the arbitrary action of confining Mr. Bryant to the South Wing for two years for walking away from a minimum custody assignment. This sentence is totally out of proportion to the offense if one takes into account the surrounding circumstances and also the deprivations a prisoner suffers in the South Wing, not only in terms of living conditions, hygiene, stultifying idleness, barely edible diet, the loss of privileges, and psychological distress as well.

Mr. Bryant should be reclassified promptly and restored to usual privileges applying to prisoners in his category.

/s/James V. Bennett
James V. Bennett

ADDENDUM E

The median period of time which elapses between the receipt of a complaint by the Inmate Grievance Commission and the issuance of a final decision by the Commission or the Secretary is indicated by the following statistics:

First, during the period from June 1, 1972 to June 18, 1973, the Commission issued a total of 238 decisions. The average and median time a prisoner waited for a final decision on his or her grievance was 5 months.

Month of Final Decision[1]	Decisions Issued[2]
1	1
2	16
3	54
4	43
5	37
6	22
7	17
8	10
9	5
10	4
11	5
12	3
13	1

[1] The Month (or Week) of Final Decision is the month or week in which the final decision was made after a complaint was initially received by the Commission. For example, during the first period *supra*, the Commission issued one decision within one month of receiving the grievance, sixteen decisions within two months of receiving the grievances, fifty-four decisions within three months of receiving the grievances, etc.

[2] The Commission issued 20 decisions during the first period and 4 decisions during the second period where no date of receipt was readily apparent from the records of the Commission. Those 24 decisions are therefore not included in the statistics.

Second, during the period from November 19, 1973 to February 20, 1974, the Commission issued a total of 127 decisions. The average time which the Commission required to render a decision was 26 weeks from the date on which the Commission initially received a complaint. The median time was 22 to 24 weeks:

Week of Final Decision	Decisions Issued
1-3	0
4-6	0
7-9	1
10-12	5
13-15	14
16-18	18
19-21	19
22-24	20
25-27	13
28-30	7
31-33	4
34-36	6
37-39	3
40-42	3
43-45	4
46-48	0
49-51	0
52-54	1
55-57	1
64	1
67	2
68	1

ADDENDUM F

TO WARDENS AND SUPERINTENDENTS:

Punitive or isolation cells will be used only when an inmate is emotionally disruptive and will be used only as a cooling off period, which can entail from one hour up to the time the inmate is reasonably calm enough to go to a segregation area without becoming disruptive. The punitive or isolation cells are not to be used as a *routine punishment area*.

Institutions that do not have mental observation cells may use the punitive or isolation cells for the purpose of housing inmates who are mentally disturbed, but only upon the approval of a psychologist or psychiatrist.

In the absence of the psychologist or psychiatrist, an inmate who is displaying mentally disturbed behavior may be placed in an isolation cell for the inmate's own safety, or that of the inmate population, until the psychologist/psychiatrist is notified. The psychologist/psychiatrist should be contacted immediately after the confinement of the inmate, and the inmate should be evaluated within a twenty-four (24) hour period.

/s/James Jordan
James Jordan
Deputy Commissioner

Supreme Court, U. S.
FILED
APR 21 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

RECEIVED
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SUPREME COURT, U.S.

NO. 75-44

ROBERT BURRELL, et al.,

Petitioners,

v.

MILTON McCRAY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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April 20, 1976.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

This supplemental brief is filed by Respondents pursuant to Rule 41(5), Rules of the Supreme Court.

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

In Respondents' brief in chief, they argued that the decision below should be affirmed without this Court reaching the broad question of whether a state prisoner may be required to exhaust state administrative remedies before being permitted to proceed in federal court under 42 U.S.C. § 1983. (Resp. Br. at 16-25). Respondents pointed out, and Petitioners concede, that the Maryland Inmate Grievance Commission does not have the authority to award either compensatory or punitive money damages which is the relief sought by all four Respondents.

Only Respondent Stokes raised claims for equitable relief in his civil rights complaint. Stokes, however, will not pursue these claims in the District Court or before the Inmate Grievance Commission when this appeal is concluded. Stokes suggests that two recent decisions have rendered his equitable claims moot, but even assuming they are not moot, Stokes will only request damages when his case reaches the District Court.

First, in Hopkins v. Collins, et al., __F. Supp.__, No. K-74-369 (D. Md. 1975), Opinion and Decree attached hereto as Exhibit A, the District Court ruled in favor of a Maryland Penitentiary prisoner who sought declaratory relief on his claim that the institution's procedures and standards for determining the newspapers, publications and other literature which prisoners may not receive are unconstitutional. The defendants have appealed to the United States Court of Appeals for the Fourth Circuit. The claims made by Stokes in his pro se complaint are virtually identical to those in the Hopkins case. Regardless of the outcome of the appeal, the result will decide Stokes' claim for equitable relief. His case, not a class action, is therefore moot. Weinstein v. Bradford, __U.S.__, 96 S. Ct. 347 (1975).

Second, in Stokes v. Institutional Board of Review, et al., No. 45341-A (Cir. Ct. No. 2 of Baltimore City, January 23, 1976), the court held that Respondent Stokes was illegally transferred from Patuxent Institution to the Maryland Penitentiary in 1971, and ordered that he be transferred from the Penitentiary to Patuxent Institution and committed there as a defective delinquent for an indeterminate sentence. See, Memorandum Opinion and Order (Exhibit B). Although the defendants have appealed to the Court of Special Appeals of Maryland, Stokes will be confined at Patuxent during the appeal. He therefore no longer has any present interest which is affected by Maryland Penitentiary censorship regulations. Weinstein v. Bradford, supra at 348; Preiser v. Newkirk, 422 U.S. 395 (1975).

Since Stokes does not intend to pursue his claim for equitable relief, and the only relief being sought by all Respondents is then damages, this case does not present the important question for which certiorari was granted. The Maryland Inmate Grievance Commission cannot provide relief to a prisoner who requests only damages for a past injury. The decision of the Court of Appeals was therefore correct on the ground that exhaustion of an inadequate state remedy may not be required. The question presented by Petitioners is before this Court only in the abstract. Under these circumstances, the writ of certiorari should be dismissed as improvidently granted. See, The Monrosa v. Carbon Black Export, Inc., 359 U.S. 710 (1959).

II. THE MARYLAND INMATE GRIEVANCE COMMISSION IS NOT AN ADEQUATE STATE ADMINISTRATIVE REMEDY, AND AN EXHAUSTION REQUIREMENT WILL NOT RESULT IN ANY BENEFIT TO THE DISTRICT COURT.

An analysis of the most recent decisions of the Inmate Grievance Commission provides compelling evidence of its inadequacy as a remedy for Maryland prisoners and shows that an exhaustion requirement will not result in any benefit to the district court.[1] During the period from January 1, 1976 through April 13, 1976, the Commission issued decisions in 145 cases in which the prisoners were granted hearings. The dispositions were as follows:

Meritorious	17
Meritorious in part	4
Not meritorious	119
Dismissed as moot	5
Total	145

1 This Court may take judicial notice of the orders of administrative agencies issued pursuant to their delegated authority. See, International Brotherhood of Teamsters, etc. v. Zantop Air Transport Corp., 394 F.2d 36, 40 (6th Cir. 1968); Salinas Valley Broadcasting Corporation v. N.L.R.B., 334 F.2d 605, 612 (9th Cir. 1964); Carter v. American Telephone and Telegraph Co., 365 F.2d 486, 491 (5th Cir. 1966). The Inmate Grievance Commission's decisions referred to herein were those listed in the Commission's docket as of April 14, 1976.

In reviewing those dispositions where the Commission found the complaint to be wholly or partially meritorious, the Secretary made the following decisions:[2]

Affirmed	4
Modified	4
Reversed	12
Moot	1
Total	21

In short, of the 145 cases heard by the Commission, relief was finally granted to only 4 prisoners (2.8%).

In addition, only a small number of the total complaints received by the Commission are granted hearings. The Commission's most recent statistics indicate that 63.6% of the complaints are dismissed without a hearing:

	Complaints received	Administrative dismissals without hearings
October, 1975	90	47
November, 1975	107	46
December, 1975	104	59
January, 1976	87	54
February, 1976	85	90
March, 1976	134	90
Totals	607	386

To summarize, the Commission dismisses without a hearing about 64% of all complaints received. Relief is granted in about 3% of the remaining 36%. For every 100 complaints made to the Commission, relief is granted to one prisoner (1.08%).

Respondents have argued that the Inmate Grievance Commission is also inadequate as an administrative remedy for purposes of an exhaustion requirement because of the excessive amount of time a prisoner must spend in having a complaint decided by the Commission. (Br. of Resp. at 91-92). During the period from

2 The Secretary is authorized to review only those cases where the Commission found the prisoner's complaint to be meritorious in whole or in part. Article 41, § 204F(f)(2).

January 1, 1976 through April 13, 1976, the median time a prisoner waited for a final decision on his or her grievance was 17 weeks.

Week of Final[3] Decision	Number of[4] Decisions Issued
1-7	0
8	1
9	2
10	1
11	2
12	3
13	9
14	10
15	5
16	15
17	14
18	11
19	13
20	10
21	3
22	2
23	2
24	3
25	1
26	2
27-29	0
30	1
31-34	0
35	1

---

3 The Week of Final Decision is the week in which the final decision was made after a complaint was initially received by the Commission. For example, in the case of inmate Duryea Johnson, I.G.C. No. 3946, the Commission received a letter of complaint on November 24, 1975, and issued a decision on March 26, 1976, granting partial relief to Mr. Johnson. On April 5, 1976, the Secretary reversed the Commission's decision. The final decision in Mr. Johnson's case, therefore, came in the 19th week after the Commission received his complaint.

4 There are 34 decisions not included in the statistics since the date of receipt of these grievances is not readily apparent from the Commission's records.

A prisoner filing his constitutional claim with the Inmate Grievance Commission has only a remote possibility of being granted relief, and it is likely that he will have to wait 4 months for the Commission's decision. An exhaustion requirement would needlessly delay for an excessive period of time the prisoner's right to proceed in federal court.

Respectfully submitted,

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Attorney for Respondents

CERTIFICATION

I HEREBY CERTIFY that on this 20th day of April, 1976, I mailed postage prepaid, a copy of the foregoing Supplemental Brief For Respondents to Clarence W. Sharp, Esq., Assistant Attorney General, One South Calvert Street, Baltimore, Maryland 21202.

CHARLES F. MORGAN

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLES K. HOPKINS :

:

V. : CIVIL NO. K-74-369

:

GEORGE H. COLLINS, WARDEN, MARYLAND PENITENTIARY, McLINDSEY HAWKINS, ASSISTANT WARDEN, MARYLAND PENITENTIARY, AND SIGMUND L. FINE, ASSISTANT WARDEN, MARYLAND PENITENTIARY, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES :

Filed: December 11, 1975

Charles F. Morgan, of Baltimore, Maryland, for Plaintiff.

Francis B. Burch, Attorney General of Maryland, and Donald R. Stutman, Assistant Attorney General of Maryland, for Defendants.

KAUFMAN, DISTRICT JUDGE.

Plaintiff, Charles K. Hopkins, presently confined in the Maryland Penitentiary, seeks summary judgment in connection with his quest for relief under 42 U.S.C. § 1983. Specifically, plaintiff contends that he has the right under the First and Fourteenth Amendments to receive and read while in confinement in that institution The Black Panther, a weekly newspaper published by the Black Panther Party. Plaintiff challenges the procedures and standards pursuant to which the defendants, the Warden and Assistant Wardens at the Maryland Penitentiary, determine the newspapers, publications and other literature which prisoners may not receive.

State of Maryland Division of Correction Regulation 250-1 (March 29, 1974) provides that mail addressed to prisoners may be returned to the sender if in the opinion of the institution such mail falls into one of the following categories:

(1) Inflammatory or advocates escape, violence, disorder, or assault.

(2) Directly or indirectly threatens the security, safety or order of the institution or its personnel.

(3) Contains coded or otherwise undecipherable language that prevents the adequate review of the material.

Plaintiff contends that those standards are broader than necessary to protect the legitimate interests of the State and violate his rights under the First Amendment. Originally, plaintiff sought injunctive as well as declaratory relief, but subsequently amended his complaint to ask only for the latter type of relief. But for that amendment this Court would have been required, as did the District Court in Procunier v. Martinez, 416 U.S. 396, 398 (1974), to ask that a three-judge District Court be convened pursuant to 28 U.S.C. § 2281 et seq. since the challenged regulation has statewide application in the institutions operated by the Maryland Division of Corrections. However, since only declaratory relief is sought herein, a single District Judge has jurisdiction and the three-judge Court statute has no application. Steffel v. Thompson, 415 U.S. 452, 456-57 n.7 (1974).

In Procunier v. Martinez, supra, Mr. Justice Powell, in addressing the problem of censorship of prisoner mail and regulations of the California Department of Corrections pertaining thereto, observed (at 409) that "censorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendments rights of those who are not prisoners" and involves both the prisoner and the party

outside of confinement who is the sender or the proposed recipient. See Aikens v. Lash, 390 F. Supp. 663, 666 (N.D. Ind. 1975); Gray v. Creamer, 376 F. Supp. 675, 677 (W.D. Pa. 1974). Moreover (at 413-14), Mr. Justice Powell wrote:

> * * * [W]e hold that censorship of prisoner mail is justified if the following criteria are met. First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad. This does not mean, of course, that prison administrators may be required to show with certainty that adverse consequences would flow from the failure to censor a particular letter. Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty. But any regulation or practice that restricts inmate correspondence must be generally necessary to protect one or more of the legitimate governmental interests identified above. [Footnote omitted.]

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Earlier in his opinion (at 408 n.11), Mr. Justice Powell noted:

> Different considerations may come into play in the case of mass mailings. No such issue is raised on these facts, and we intimate no view as to its proper resolution.

The issue of the receipt of publications mailed to prisoners from the outside has been, however, specifically considered by several District Courts in a post-Procunier setting. Aikens v. Lash, supra; McClearly v. Kelly, 376 F. Supp. 1186, 1192 (M. D. Pa. 1974); Gray v. Creamer, supra.[1] Those Courts held the Procunier standards to be applicable. So does this Court. In spite of the Supreme Court's reservation of the issue, the guidelines set forth in Procunier would appear workable and operable with regard to receipt and use of outside publications.

In Procunier, the Supreme Court disapproved regulations which permit censorship of "inflammatory" letters, characterizing "[t]hese regulations [as] fairly invit[ing] prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship." 416 U.S. at 415. Accordingly, the use of the word "inflammatory" in the Maryland regulation under consideration herein is constitutionally infirm. Additionally, the second standard of the Division of Correction regulation permitting censorship of mail which "directly or indirectly threatens the security, safety or order of the institution or its personnel"

---

[1] See also The Luparar v. Stoneman, 382 F. Supp. 495, 501 (D. Vt. 1974).

is vague and provides insufficient guidance to officials, to inmates and to the latter's correspondents. As the Supreme Court has emphasized in Procunier (416 U.S. at 415-16), such regulations should be narrowly drawn, unless confinement officials can show that broad restrictions are necessary to the furtherance of a substantial governmental interest unrelated to the suppression of expression and required by "the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners" (at 412) (footnote omitted). Herein, the record fails to establish that the broad restrictions of the second standard of the state regulations are necessary or essential to further those legitimate governmental interests and that those interests could not be appropriately served by narrower and more specifically drawn regulations. On the other hand, the third standard of those regulations,and that part of the first standard thereof which prohibits direct advocacy of particular types of acts,would appear to be drawn with adequate specificity and to provide limited censorship sufficiently supported by legitimate state interests.

In Procunier, the Supreme Court wrote (416 U.S. at 414 n.14) that "[w]hile not necessarily controlling,the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction" and referred to regulations of the Federal Bureau of Prisons which are far more specific than the regulations under attack herein. In addition, Mr. Justice Powell

characterized the California regulations, which were promulgated after the District Court held the original California regulations unconstitutional and which were approved by the District Court, as "indicative of one solution to the problem" (414 U.S. at 416 n.15). Another example of regulations which have passed constitutional muster in a post-Procunier setting are those which were approved in McCleary v. Kelly, 376 F. Supp. supra at 1190, and in Gary v. Creamer, 376 F. Supp. supra at 678. Taken together with the standards established by Mr. Justice Powell, regulations of the federal, California and Pennsylvania confinement institutions which passed constitutional muster in Procunier and in the cases in the Middle and Western Districts of Pennsylvania provide clear guidelines for the type of regulations which can constitutionally be adopted by the Maryland authorities. Those now in existence are constitutionally wanting to the extent explicated supra.

Plaintiff also challenges the procedures under which mail is withheld from prisoners at the Maryland Penitentiary pursuant to which "[t]he inmate shall be given written notice of mail that has been withheld * * * [and] may appeal such action by letter to the Commissioner." Defendants have informed this Court that they have agreed with plaintiff to modify their regulations to include the following:

If, after a reading by the authorized institution official, of any mail, publication, newspaper, periodical, literature or other written material of any kind, the official proposes that such material, or any portion thereof, be taken or kept from an inmate because of its contents, the inmate shall be entitled to the following procedures:

1. The inmate shall be furnished a written statement that certain named or described materials are sought to be taken or withheld from the inmate and setting forth the reason(s) for the proposed action. If the materials sought to be taken or withheld from the inmate were mailed or delivered to the inmate from a person outside the institution, any such person shall also be furnished with the written statement described above. The written statement shall be served on the inmate and any other such person no more than forty-eight (48) hours after the proposed decision to take or withhold the materials from the inmate.

2. When materials are withheld, the determination shall be made by the Warden and the Assistant Warden for Custody and Treatment or their designees.

3. The inmate will be given a reasonable time to respond to the decision to withhold the materials, in writing, to the Warden and his Committee.

4. In its review of the materials, the Warden and his Committee shall consider, and adopt where appropriate any existing alternative(s) short of taking or withholding written materials from the inmate.

5. No more than seven (7) days after the receipt at the institution of the materials under consideration, the Warden and his Committee shall make a written report of its decision, to include a summary of the evidence, the decision, the reason for the decision and the facts upon which the decision is based. The written report shall be given to the inmate and to any person outside the institution who mailed or delivered the written materials to the inmate.

6. The inmate and any such person shall be informed that if they object to the decision of the Warden and his Committee, either of them may appeal the decision to the Commissioner of Corrections, provided that such an appeal is made in writing, stating the reasons for the appeal, no more than five (5) days after service of the decision on them.

7. If the final decision of the Warden and his Committee, and the Commissioner of Corrections in cases where an appeal is taken, is that materials which have been mailed or delivered to an inmate from a person outside the institution will be withheld from the inmate such materials shall be promptly returned to the sender.

Plaintiff has stated that those provisions are acceptable to him. This Court hereby also approves the same, with the comment that it would be constitutionally permissible for defendants to provide that the time periods of 48 hours and 7 days referred to therein may each be lengthened in an emergency but only to the extent required by the emergency. The parties have informed this Court that a further amendment to the Maryland regulations so providing is acceptable to both sides.

In the light of such agreement, the only procedural challenge which plaintiff continues to mount relates to whether the inmate whose mail is withheld or censored is entitled to a hearing in connection with such withholding or censorship. In Procunier (at 417-18), Mr. Justice Powell wrote:

> We also agree with the District Court that the decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards. The interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a "liberty" interest within the meaning of the Fourteenth Amendment even though qualified of necessity by the circumstance of imprisonment. As such, it is protected from arbitrary governmental invasion. See Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972). The District Court required that an inmate be notified of the rejection of a letter written by or addressed to him, that the author of that letter be given a reasonable opportunity to protest that decision, and that complaints be referred to a prison official other than the person who originally disapproved the correspondence. These requirements do not appear to be unduly burdensome, nor do appellants so contend. Accordingly, we affirm the judgment of the District Court with respect to the Department's regulations relating to prisoner mail.

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Mr. Justice Powell did not indicate in Procunier if or when a hearing is needed to meet constitutional due process requirements.

In Wolff v. McDonnell, 418 U.S. 539, 558-59 (1974), Mr. Justice White wrote fully with regard to the hearing issue in that case in the context of loss of good time credits in connection with prison disciplinary problems in a Nebraska confinement institution.[2] Discussing the flexible requirements of due process, Mr. Justice White noted:

> We have often repeated that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers v. McElroy, 367 U.S., at 895. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Ibid.; Morrissey, 408 U.S., at 481. Viewed in this light it is immediately apparent that one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison.

Addressing the question of what procedures were required to meet procedural due process standards, Mr. Justice White referred to Morrissey v. Brewer, 408 U.S. 471 (1972), and wrote (at 559):

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2 (See p. 11.)

(Footnote 2 from p. 10)

Although in Wolff, Mr. Justice White was addressing the requirement of due process in the context of loss of good time credits in a Nebraska confinement situation, courts in a post-Wolff setting have applied Wolff to other prison situations, and have required that due process be afforded inmates who are transferred from one institution to another for punitive reasons. See, e.g., Fano v. Meachum, 520 F.2d 374, 376 n.2, 377-79 (1st Cir. 1975), cert. granted, 44 U.S.L.W. 3339 (U.S. Dec. 8, 1975); Gomes v. Travisono, 510 F.2d 537 (1st Cir. 1974) (interstate transfers); Stone v. Egeler, 506 F.2d 287, 288 (6th Cir. 1974). Because of the difficulty in distinguishing between "administrative" and "punitive" transfers and because administrative transfer may cause a "major change in institutional conditions" for an inmate, a number of courts imposed procedural due process requirements in administrative as well as punitive transfers. See, e.g., Newkirk v. Butler, 499 F.2d 1214, 1217-18 (2d Cir. 1974), and cases cited thereat, vacated on ground of mootness, 45 L.Ed.2d 272 (1975); Robbins v. Kleindienst, 383 F. Supp. 239, 246-48 (D.D.C. 1974), and cases cited thereat; Clonce v. Richardson, 379 F. Supp. 338, 349 (W.D. Mo. 1974). See also Williams v. Bounds, Civil No. 74-2008 (4th Cir. Aug. 30, 1974) (Memorandum Decision in which Judges Butzner, Russell and Field indicated that Wolff may require minimun due process in nondisciplinary prison transfers).

Those cases which have applied Wolff in areas other than prison disciplinary proceedings lend support to this Court's holding that due process safeguards must be provided when mail is censored or withheld from inmates because those cases indicate that the due process requirements of Wolff are of broader application. The Supreme Court may soon further indicate the extent of Wolff's application this term since the Court has granted certiorari in a prison transfer case. Haynes v. Montanye, 505 F.2d 977 (2d Cir. 1974), cert. granted, 43 U.S.L.W. 3681 (U.S. June 30, 1975).

Morrissey held that due process imposed certain minimum procedural requirements which must be satisfied before parole could finally be revoked. These procedures were:

> "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." 408 U. S., at 489.

And (at 560-63) Mr. Justice White continued:

> Revocation of parole may deprive the parolee of only conditional liberty, but it nevertheless "inflicts a 'grievous loss' on the parolee and often on others." *Id.*, at 482. Simply put, revocation proceedings determine whether the parolee will be free or in prison, a matter of obvious great moment to him. For the prison inmate, the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee. The deprivation, very likely, does not then and there work any change in the conditions of his liberty. It can postpone the date of eligibility for parole and extend the maximum term to be served, but it is not

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if not restored, it cannot be said with certainty that the actual date of parole will be affected; and if parole occurs, the extension of the maximum term resulting from loss of good time may affect only the termination of parole, and it may not even do that. The deprivation of good time is unquestionably a matter of considerable importance. The State reserves it as a sanction for serious misconduct, and we should not unrealistically discount its significance. But it is qualitatively and quantitatively different from the revocation of parole or probation.

In striking the balance that the Due Process Clause demands, however, we think the major consideration militating against adopting the full range of procedures suggested by *Morrissey* for alleged parole violators is the very different stake the State has in the structure and content of the prison disciplinary hearing. That the revocation of parole be justified and based on an accurate assessment of the facts is a critical matter to the State as well as the parolee; but the procedures by which it is determined whether the conditions of parole have been breached do not themselves threaten other important state interests, parole officers, the police, or witnesses—at least no more so than in the case of the ordinary criminal trial. Prison disciplinary proceedings, on the other hand, take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so.

* * *

In Wolff, Mr. Jusitce White concluded (at 564-69):

* * * We hold that written notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense. At least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance before the Adjustment Committee.

We also hold that there must be a "written statement by the factfinders as to the evidence relied on and reasons" for the disciplinary action. *Morrissey*, 408 U. S., at 489. * * *

We are also of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. Ordinarily, the right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out

the correctional program of the institution. We should not be too ready to exercise oversight and put aside the judgment of prison administrators. It may be that an individual threatened with serious sanctions would normally be entitled to present witnesses and relevant documentary evidence; but here we must balance the inmate's interest in avoiding loss of good time against the needs of the prison, and some amount of flexibility and accommodation is required. Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence. Although we do not prescribe it, it would be useful for the Committee to state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases. Any less flexible rule appears untenable as a constitutional matter, at least on the record made in this case. The operation of a correctional institution is at best an extraordinarily difficult undertaking. Many prison officials, on the spot and with the responsibility for the safety of inmates and staff, are reluctant to extend the unqualified right to call witnesses; and in our view, they must have the necessary discretion without being subject to unduly crippling constitutional impediments. There is this much play in the joints of the Due Process Clause, and we stop short of imposing a more demanding rule with respect to witnesses and documents.

Confrontation and cross-examination present greater hazards to institutional interests. If confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed as a matter of course, as in criminal trials, there would be considerable potential for havoc inside the prison walls. Proceedings would inevitably be longer and tend to unmanageability. These procedures are essential in criminal trials where the accused, if found guilty, may be subjected to the most serious deprivations, *Pointer* v. *Texas*, 380 U. S. 400 (1965), or where a person may lose his job in society, *Greene* v. *McElroy*, 360 U. S. 474, 496–497 (1959). But they are not rights universally applicable to all hearings. See *Arnett* v. *Kennedy*, 416 U. S. 134 (1974). Rules of procedure may be shaped by consideration of the risks of error, *In re Winship*, 397 U. S. 358, 368 (1970) (Harlan, J., concurring); *Arnett* v. *Kennedy*, *supra*, p. 171 (WHITE, J., concurring in part and dissenting in part), and should also be shaped by the consequences which will follow their adoption. Although some States do seem to allow cross-examination in disciplinary hearings, we are not apprized of the conditions under which

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the procedure may be curtailed; and it does not appear that confrontation and cross-examination are generally required in this context. We think that the Constitution should not be read to impose the procedure at the present time and that adequate bases for decision in prison disciplinary cases can be arrived at without cross-examination.

* * * Within the limits set forth in this opinion we are content for now to leave the continuing development of measures to review adverse actions affecting inmates to the sound discretion of corrections officials administering the scope of such inquiries.

We recognize that the problems of potential disruption may differ depending on whom the inmate proposes to cross-examine. If he proposes to examine an unknown fellow inmate, the danger may be the greatest, since the disclosure of the identity of the accuser, and the cross-examination which will follow, may pose a high risk of reprisal within the institution. Conversely, the inmate accuser, who might freely tell his story privately to prison officials, may refuse to testify or admit any knowledge of the situation in question. Although the dangers posed by cross-examination of known inmate accusers, or guards, may be less, the resentment which may persist after confrontation may still be substantial. Also, even where the accuser or adverse witness is known, the disclosure of third parties may pose a problem. There may be a class of cases where the facts are closely disputed, and the character of the parties minimizes the dangers involved. However, any constitutional rule tailored to meet these situations would undoubtedly produce great litigation and attendant costs in a much wider range of cases. Further, in the last analysis, even within the narrow range of cases where interest balancing may well dictate cross-examination, courts will be faced with the assessment of prison officials as to the dangers involved, and there would be a limited basis for upsetting such judgments. The better course at this time, in a period where prisons practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons. [Footnotes omitted.]

There was also present in Wolff the issue of opening and inspecting letters to prisoners from attorneys. In the course of holding (at 577) that "* * * a rule whereby the inmate is present when mail from attorneys is inspected * * *" is as much "and perhaps even more, than the Constitution requires", Mr. Justice White stated (at 575-76):

> * * * While First Amendment rights of correspondents with prisoners may protect against the censoring of inmate mail, when not necessary to protect legitimate governmental interests, see Procunier v. Martinez, 416 U.S. 396 (1974), this Court has not yet recognized First Amendment rights of prisoners in this context * * *.

A number of district courts have considered what procedural due process must accompany mail censorship and have required that the inmate be given a reasonable opportunity to protest the decisions. See, e.g., Aikens v. Lash, 390 F. Supp., supra at 672; The Lupara v. Stoneman, 382 F. Supp. 495, 502 (D. Vt. 1974); McClearly v. Kelly, 376 F. Supp., supra at 1192; Gray v. Creamer, 376 F. Supp., supra at 678. See also Laaman v. Hancock, 351 F. Supp. 1265, 1268 (D. N.H. 1972). What type of opportunity is so required has/not been determined ,however, by those Courts.

The parties have stipulated:

> On occasion, in addition to the instance in the present case, officials at the Maryland Penitentiary, acting under the regulations described * * * [see p. 2] supra, have refused to permit inmates to receive and read certain literature; for example, on December 5, 1973, James E. Stokes and Aaron Holsey were refused permission to receive an issue of Worker's World, and on January 16, 1974, James Bonnett and Aaron Holsey were refused permission to receive an issue of the Midnight Special.

* * * On about five occasions each year, officials at the Penitentiary, upon reviewing the literature or reading materials that inmates seek to receive and read, decide that the inmates may not receive and read such materials on account of their contents.

In the operation and maintenance of the Maryland Penitentiary and the Patuxent Institution, the Order in Fitzgerald v. Boslow [3] * * * has not had any deletorious effect on the institution's ability to preserve internal order and discipline, to maintain institutional security, to provide personal safety for guards and inmates or to provide for the rehabilitation of prisoners, and has not created any administrative burden or expense.

Under the Interim Decree entered by this Court on July 27, 1972, in Collins v. Schoonfield, [3A] Civil No. 71-500-K, the Baltimore City Jail has the following regulation with regard to the literature inmates may possess and receive (Slip Opinion at 15-16):

> "No publication or any portion thereof may be taken or kept from an inmate because of its contents unless, after appropriate investigation, it has been determined that such content presents a clear and present danger to the security of the jail, or has been banned from the mails by the United States Postal Service because of obscene content. If any publication or any portion thereof is taken or kept from an inmate for any reason, such inmate shall be notified thereof in writing and shall, on written request, be entitled to a hearing by a hearing officer in connection therewith."

In the operation and maintenance of the Baltimore City Jail, the implementation of the regulation, supra, has not had any deletorious effect on the Jail's ability to preserve internal order and discipline, to maintain institutional security, or to provide personal safety for guards and inmates, and has not created any administrative burden or expense.

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3 Fitzgerald v. Boslow is Civil No. 19592 in this Court. It was affirmed in Nos. 73-2143 and 73-2114 (4th Cir. March 20, 1974), cert. denied, No. 73-6917 (U.S. November 25, 1974).

3A The Collins v. Schoonfield Interim Decree, promulgated after the filing of this Court's opinion, 344 F. Supp. 257 (D. Md. 1972) is itself unpublished. A copy of that Decree has been placed in the official court file in this case.

Under those circumstances, the proper accommodation between "institutional needs and objectives and the provisions of the Constitution that are of general application", Wolff v. McDonnell, supra at 556, and Mr. Justice White's entire approach in Wolff, strongly suggest that the inmates should be given the opportunity to protest the officials' decision at a hearing subject to the exercise of discretionary control by the "prison officials, on the spot" (at 566).

The problems inherent in connection with prison disciplinary hearings which are focused upon in Wolff may be, in most instances, more severe than those which can be expected in the context of protests concerning mail censorship. Thus, perhaps, the same degree of flexible discretionary control by prison officials, opted for by the Supreme Court in the context of Wolff, may not be necessary with regard to mail issues. However, it would still appear highly desirable. That is particularly so if such control is coupled with the requirement, suggested in Wolff (at 566), that the prison hearing official or officials state in writing the reason why the calling of a particular witness or the presentation of any evidence proferred by the inmate is proscribed in whole or in part. The lack of difficulties encountered in the implementation of the decrees in Fitzgerald v. Boslow, supra, and Collins v. Schoonfield, supra, is noted and supports the conclusion that the approach adopted by this Court herein will not prove detrimental to the administration of Maryland's confinement institutions by the defendant officials.

Counsel for plaintiff is hereby required to present to this Court a proposed Declaratory Decree,

on or before the 9th day of January, 1976. Defendants' views, with regard to such submission, including whether defendants agree or disagree therewith, and if defendants disagree, why they so do, shall be filed by counsel for defendants on or before the 26th day of January, 1976.

Jos A Kaufman
United States District Judge
12/11/75

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLES K. HOPKINS :
:
V. : CIVIL NO. K-74-369
:
GEORGE H. COLLINS, et al. :

DECREE

This matter having come before the Court on the plaintiff's complaint for declaratory relief brought under 42 U.S.C. § 1983, the Court having considered the pleadings, stipulation and memoranda filed by the parties and the Court having filed its opinion in this matter on December 11, 1975, it is, this 12th day of ~~February~~ March, 1976, hereby DECLARED, ORDERED, ADJUDGED AND DECREED that:

3/12/76

1. It is unconstitutional for the defendants to use as standards concerning the withholding of mail addressed to inmates of institutions operated by the State of Maryland Division of Correction any of the following:

a. that which is "inflammatory";

b. that which "directly or indirectly threatens the security, safety or order of the institution or its personnel".

2. It is unconstitutional for the defendants to restrict the reading materials which a prisoner may receive or read unless they show that any such restriction furthers a substantial governmental interest such as security, order or rehabilitation, and is no greater than is necessary or essential to the

protection of that interest.

3. In its opinion, pages 6-9, the Court approved certain amendments to State of Maryland Division of Correction Regulation 250-1 (March 29, 1974) which defendants had agreed to adopt.

4. It is unconstitutional for the defendants to restrict receipt or reading of any mail, publication, newspaper, periodical, literature, or other written material of any kind unless the prisoner and the person (the "correspondent") who mailed or delivered the same to the prisoner are afforded at least the following additional elements of procedural due process:

a. The prisoner and the correspondent shall be furnished a written statement that, if either or both so request, the person or persons so requesting are entitled to appear at a hearing before the Warden and his committee, or their designees, to contest the proposed decision.

b. If a hearing is requested by either the prisoner or the correspondent, such a hearing shall be held with reasonable promptness.

c. At the hearing, the prisoner if he appears thereat, and the correspondent if he appears thereat, shall have the right (1) to be informed of the facts which have been advanced in support of the proposed decision to restrict the reading materials; (2) to have a reasonable opportunity to contest or deny those facts; (3) to present any factual corrections and reasons why the reading materials should not be restricted; and (4) to call witnesses, introduce

documentary evidence and confront and cross-examine adverse witnesses for the purpose of presenting relevant and material evidence unless to do so would create risk of reprisal or undermine authority or endanger the security, order, discipline or safety of the institution. If the committee decides not to permit the prisoner or the correspondent the opportunity to call a particular witness, present documentary evidence or confront and cross-examine an adverse witness, the committee must state in writing its reason for its decision. The committee may record its reason in camera if it specifies the reasons for so doing and makes its reasons for such restriction and for such in camera recording available for court review.

5. The defendants' specific action with regard to The Black Panther, complained of herein, was unconstitutional.

Joseph C. Howard
United States District Judge

EXHIBIT B

JAMES E. STOKES	*	IN THE
vs.	*	CIRCUIT COURT NO. 2
INSTITUTIONAL BOARD OF REVIEW OF PATUXENT INSTITUTION	*	OF
	*	BALTIMORE CITY
and	*	Docket 83A
CRIMINAL COURT OF BALTIMORE	*	Folio 154
	*	Case No. 45341-A

****

MEMORANDUM OPINION AND ORDER

Cole, J.

The matter before the Court involves the right of the complainant, as an inmate of Patuxent Institution, to prior notice and a hearing, before the Board of Review of Patuxent Institution can divest him of his inmate status and return him to the Department of Corrections pursuant to Art. 31B, Section 13(d), Md. Ann. Code.

The agreed facts are as follows:

The complainant, James E. Stokes, was convicted in the Criminal Court of Baltimore City on May 21, 1968 of robbery with a deadly weapon and escape, for which he was sentenced to serve 40 years in the custody of the Maryland Division of Correction. At that time, Stokes was also recommended for commitment to Patuxent Institution as a defective delinquent.

On May 14, 1969, the complainant was, in fact, determined to be a defective delinquent at a judicial hearing. His criminal sentence was thereupon suspended, and he was

committed to Patuxent Institution for an indeterminate period, in accord with the provisions of Art. 31B, Section 9(b).

On September 3, 1971 the respondent, Institutional Board of Review, petitioned the Criminal Court of Baltimore for an order to remove the complainant from his inmate status and return him to the Division of Correction to resume his original sentence. The grounds for the petition were that, in the view of the Patuxent Staff, Stokes was not amenable to treatment. On September 9, 1971, an ex parte order was signed transferring the complainant to the Maryland Penitentiary.

In 1973, the complainant protested the ex parte termination of his defective delinquent status as unconstitutional by filing a complaint in the United States District Court for the District of Maryland. That court dismissed the complaint for failure to state a claim upon which relief could be granted. Stokes v. Institutional Board of Patuxent, 357 F. Supp. 701 (D. Md. 1973). That decision was reversed on appeal, and the case was remanded for the convening of a statutory three-judge court to hear the complaint. Stokes v. Institutional Board of Review, 506 F. 2d. 1397 (4th Cir. 1974).

Upon the remand of the case to the District Court, the parties entered into a court-approved Consent Order, under which that court abstained in the case pending a determination of Stokes' claims in the State courts.

The complainant now comes before this Court, and prays for declaratory and injunctive relief which would reinstate him to the status of a defective delinquent and effect his

transfer back to the Patuxent Institution as an inmate. The complainant further prays this Court to enjoin the defendants from disturbing his inmate status at Patuxent without first giving him the opportunity to contest such a decision at a judicial hearing for which he would be provided with notice. In addition, the complainant prays a declaratory judgment declaring Art. 31B, Section 13(d) unconstitutional. That statute provides in pertinent part:

> The board may also request the court which imposed upon the person the original sentence resulting in his being subsequently classified as a defective delinquent, to reinstate the said original sentence; and the said court is authorized and empowered following such a request to reinstate and reimpose the said original sentence, and to cause the said person to be held in custody therefor, as provided herein below.

Inasmuch as adequate relief may be afforded the complainant without deciding the constitutional question, the Court does not reach this issue.

It is the complainant's contention that his former status as an inmate of Patuxent Institution afforded him the benefit of confinement and treatment as a defective delinquent, which benefit he would not receive if incarcerated through the Department of Corrections. The Maryland Court of Appeals has recently reaffirmed its recognition that the nature of confinement in Patuxent is curative rather than punitive. Melvin Williams and Madison Fulwood v. Director, Patuxent Institution, 347A 2d 179, #115, Sept. Term 1974, Reported December 2-3, 1975, The Daily Record. Williams, supra court opined that

"The detention in Patuxent Institution is not by way of punishment for a crime, but is preventive and therapeutic." This Court finds, therefore, that the complainant's status as an inmate of Patuxent does, in fact, confer a substantial benefit on him.

Whether or not the complainant has any right to this benefit has been addressed by the United States District Court for the District of Maryland in Stokes v. Institutional Board of Review, State of Maryland, 357 F. Supp. 701 (1973). That court decided that there was "... no due process violations in the termination of one's status as a defective delinquent by an ex parte process." Ibid., at p. 704. That decision was reversed on appeal. Stokes v. Institutional Board of Review, 506 F. 2d 1397 (4th Cir. 1974). Although it did not reach the merits of the case, the appellate court did find that the complainant's claim was "... not so insubstantial as to warrant the dismissal of the action or the denial of a right to a three-judge court." (Ibid. Unpublished opinion).

This Court concludes, therefore, that the complainant is entitled to contest his removal from Patuxent Institution at a judicial hearing for which he should receive adequate notice.

It is therefore ORDERED, this 23rd day of January, 1976 that:

1. The status of the complainant, James E. Stokes be and is hereby determined to be a defective delinquent and further, that

2. The complainant, James E. Stokes, be and is hereby transferred from the Maryland Division of Correction to Patuxent

Institution and further, that

3. The respondents be and hereby are permanently enjoined from divesting the complainant of his defective delinquent status without prior written notice of 30 days and a full and fair judicial hearing, at which the complainant will have the right to present evidence and to cross-examine the witnesses against him. Nothing herein shall be construed to deny the complainant representation by counsel.

Harry A. Cole
Judge

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-44

ROBERT BURRELL, et al.,

Petitioners,

v.

MILTON McCRAY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION NE RECIPIATUR

Petitioners, by their attorneys, Francis B. Burch, Attorney General of Maryland, Henry R. Lord, Deputy Attorney General of Maryland, Donald R. Stutman and Glenn E. Bushel, Assistant Attorneys General, move, pursuant to Rule 35, Rules of the United States Supreme Court, that the Supplemental Brief for Respondents filed herein not be received, or, in the alternative, be stricken, and for reasons say:

1. That pursuant to Rule 41(5), Rules of the United States Supreme Court, a party may present to this Court late authorities, newly-enacted legislation, or other intervening matters not available at the time their brief in chief was filed.

2. That Respondents have filed a Supplemental Brief (received by Petitioners on April 21, 1976) incorporating, in essence, new issues and material all of which was available when their Appellees' (Respondents') brief was filed on February 9, 1976.

3. That the Supplemental Brief for Respondents, although it cites Rule 41(5), does not comply with its terms in that it does not present any information within the contemplation of that rule.

WHEREFORE, Respondents pray that the Supplemental Brief for Respondents be not received, or, in the alternative, be stricken.

Francis B. Burch
Attorney General of Maryland

Henry R. Lord
Deputy Attorney General
of Maryland

Donald R. Stutman
Assistant Attorney General
of Maryland

Glenn E. Bushel
Assistant Attorney General
of Maryland

Attorneys for Petitioners

I HEREBY CERTIFY, That on this 23rd day of April, 1976, a copy of the aforegoing Motion Ne Recipiatur, together with the Memorandum in support thereof, was mailed, postage prepaid, to Charles F. Morgan, Esq., Barbara M. Milstein, Esq., Michael Millemann, Esq., and C. Christopher Brown, Esq., Attorneys for Respondents, 341 North Calvert Street, Baltimore, Maryland 21202.

Donald R. Stutman
Assistant Attorney General
of Maryland

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75-44

ROBERT BURRELL, et al.,

Petitioners,

v.

MILTON McCRAY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEMORANDUM IN SUPPORT OF
MOTION NE RECIPIATUR

Rule 41(5), Rules of the United States Supreme Court, provides:

> Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief, he may file forty printed copies of a supplemental brief, restricted to such new matter and otherwise in conformity with these rules, up to the time the case is called for hearing, or, by leave of court, thereafter. [Emphasis supplied.]

Respondents were originally required to file their brief on January 28, 1976, and by letter dated January 20, 1976, directed to the Clerk, requested an extension to and including February 9, 1976. That extension was granted by the Clerk by letter dated January 22, 1976.

(1) Respondents improperly raise not only "intervening matters" but also what amounts to a new issue in their supplemental brief. Succinctly stated, they allege that Respondent Stokes, who requested, in his original complaint, not only damages but declaratory and injunctive relief, will now be satisfied with any decision finally rendered in the case of Hopkins v. Collins, ___ F. Supp. ____, No. K-74-369 (D. Md., Dec. 11, 1975). See A32a through 36a. While Respondent Stokes may or may not be satisfied with any decision in Hopkins v. Collins, he has made no effort, at this point, to dismiss his claims for injunctive or declaratory relief. Further, even though Respondent Stokes is no longer incarcerated at the Maryland Penitentiary, there is a real possibility that he will be returned to the Maryland Penitentiary and would therefore continue the litigation.

The issue of exhaustion of state administrative remedies is still viable in the two cases on appeal regarding Respondent McCray, as the trial court in this case granted the State's motions to dismiss. Finally, Respondent Washington claimed not only monetary damages, but declaratory and injunctive relief. Those claims have not been excised from Respondent Washington's complaint at this time. See A239a-242a.

Respondents allege in their first argument that as only monetary damages remain for consideration by the Grievance Commission, no relief could be granted and therefore this case is moot. They support this argument by citation to Hopkins v. Collins, supra, and Stokes v. Institutional Board of Review, No. 45341-A (Circuit Court No. 2 of Baltimore City, Jan. 23, 1976). Hopkins v. Collins, supra, was decided on December 11, 1975, and Stokes v. Institutional Board of Review, supra, was decided on January 23, 1976. In both cases, Charles F. Morgan, Esq., attorney for Respondents in this case, was attorney for plaintiffs Hopkins and Stokes. He therefore had actual knowledge of the decisions in

those cases long before his brief was due to be filed in this Court on February 9, 1976. Pursuant to Rule 41(5), Respondents' first argument presents no "late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief" and are not properly filed under that rule.

(2) Respondents' second argument relates to information regarding decisions of the Maryland Inmate Grievance Commission from January 1, 1976, through and including April 13, 1976. Respondents attempt to prove, by these figures, that the Maryland Inmate Grievance Commission is ineffective, but fail to elaborate on the types of complaints reviewed, the nature of the relief granted, or the reasons that certain decisions of the Maryland Inmate Grievance Commission were reversed by the Secretary of Public Safety and Correctional Services. Not only was most of this information available to Respondents when their brief in chief was written, but it is statistically unreliable because Respondents chose a relatively short period of time to gather those statistics. See, for example, Petitioners' Brief, footnote 12 at 42 and footnote 34 at 87-89.

In summary, Respondents have not presented to this Court any "late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief." Under these circumstances,

Respondents' Supplemental Brief should not be received or, in the alternative, should be stricken.

Francis B. Burch
Attorney General of Maryland

Henry R. Lord
Deputy Attorney General
of Maryland

Donald R. Stutman
Assistant Attorney General
of Maryland

Glenn E. Bushel
Assistant Attorney General
of Maryland

Attorneys for Petitioners

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-44

RECEIVED
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SUPREME COURT, U.S.

ROBERT BURRELL, et al.

v.

MILTON McCRAY, et al.

RESPONDENTS' OPPOSITION TO MOTION NE RECIPIATUR

Respondents, through counsel, pursuant to Rule 35(4), Rules of the United States Supreme Court, hereby oppose Petitioners' Motion Ne Recipiatur and request that it be denied for the reasons stated herein. Petitioners request the Court to not receive, or in the alternative, to strike, Respondents' supplemental brief on the grounds that it does not comply with the provisions of Rule 41(5), Rules of the United States Supreme Court.

I. RESPONDENTS' SUPPLEMENTAL BRIEF CONTAINS LATE AUTHORITIES AND OTHER INTERVENING MATTERS THAT WERE NOT AVAILABLE IN TIME TO HAVE BEEN INCLUDED IN THEIR BRIEF IN CHIEF.

The judicial and administrative decisions which Respondents discussed in their supplemental brief were not available in time to have been included in their brief in chief which was filed on February 12, 1976. The final decree in Hopkins v. Collins, et al., __F.Supp.__, No. K-74-369 (D. Md. 1975), was signed by District Court Judge Kaufman on March 12, 1976, and the defendants' appeal was filed on April 9, 1976. In Stokes v. Institutional Board of Review of Patuxent Institution, et al., No. 45341-A

(Cir. Ct. No. 2 of Baltimore City), the court filed its Memorandum Opinion and Order on January 23, 1976. The decision would have been final after 30 days, and the defendants appealed on February 20, 1976, eight days after Respondents' supplemental brief was filed in the present case.

The administrative agency decisions of the Maryland Inmate Grievance Commission to which reference was made in Respondents' supplemental brief were filed between January 1, 1976 and April 13, 1976. Although perhaps some of those decisions made in January, 1976, could have been included in Respondents' brief in chief, in order to present a complete analysis of the Commission's decisions during the final quarter before argument in this case, it was necessary to wait until April 13, 1976, to gather the relevant information. The Inmate Grievance Commission decisions are therefore intervening matters not available in time to have been included in Respondents' brief in chief within the contemplation of Rule 41(5).

II. RESPONDENTS' SUPPLEMENTAL BRIEF DOES NOT RAISE NEW ISSUES.

The matters in Respondents' supplemental brief, do not raise new issues, but rather, they provide additional support for the arguments which Respondents have already presented in their brief in chief; specifically, that the Maryland Inmate Grievance Commission is an inadequate state remedy (Resp. Br. at 16, 70); that an exhaustion of state administrative remedies requirement in prisoner § 1983 actions will not result in any benefit to the federal courts (Id., at 44); and that if an exhaustion rule is to be imposed, it should be created not by this Court but by Congress. (Id., at 68).

The Maryland state remedy is clearly an inadequate remedy in all of the cases before the Court because it cannot award

damages and therefore, cannot grant any relief to Respondents.[1] The cases cited by Respondents in their supplemental brief directly affect Respondent Stokes and make it unnecessary for him to pursue his equitable claims. He has been transferred from the Maryland Penitentiary to Patuxent Institution and committed there as a defective delinquent for an indeterminate sentence. Stokes therefore has no present interest which is affected by Penitentiary censorship regulations. In addition, the identical constitutional challenges made by Stokes to those regulations have been decided in the Hopkins case. Whatever the outcome of the State's appeal, Stokes' equitable claim will be resolved.

The Inmate Grievance Commission decisions discussed in Respondents' supplemental brief were offered as additional support for their argument that the Commission is an inadequate state remedy whether a prisoner is requesting equitable relief or damages to vindicate his constitutional rights. Two principal purposes for application of the exhaustion of administrative remedies doctrine are to permit the agency to correct its own errors so that intervention by the courts is unnecessary and to assist the courts by allowing the agency to make a factual record, exercise its discretion or apply its expertise. The matters in Respondents' supplemental brief support their argument that none of these purposes would be served by causing these Respondents or any Maryland prisoners to resort to the Commission before proceeding in federal court.

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1 Petitioners' statement in their motion that Respondent Washington requested injunctive relief in his pro se complaint is not accurate. See, App. at 24la.

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In addition, the information presented in the supplemental brief demonstrates that Congress alone is uniquely able to decide the difficult questions of whether there should be an exhaustion requirement in prisoner § 1983 cases and if so, what may be considered an adequate state administrative remedy.[2] There are conflicting policy considerations that support and oppose an exhaustion requirement. They cannot be resolved without having a great deal more information from the States and the federal courts than is available in the record of the present case.

An even more difficult task is in setting standards and procedures for what is an adequate administrative remedy. The amicus brief supporting Petitioners indicates the wide variety of grievance mechanisms presently being used by many of the 50 separate state prison systems. The Court should not attempt to prescribe a due process model for State grievance procedures when such a task can be so appropriately accomplished by Congress. The flexibility of the States should not be restricted at this time when grievance mechanisms are in a stage of development and experimentation. On the other hand, the problem in setting

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2 Respondents have argued that this Court should defer to Congress on the question of whether exhaustion of state administrative remedies should be a requirement under § 1983. In Monroe v. Pape, 365 U.S. 167, 180 (1961), this Court stated that "[i]t is abundantly clear that one reason the legislation [§ 1979, the statutory predecessor to § 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the 14th Amendment might be denied by the state agencies." (emphasis added). Recognizing that § 1979 was enacted because of conditions existing in 1871, the Court found Congress intended that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Id. at 183. If circumstances have in fact changed, and the rationale which existed in 1871 for a no-exhaustion rule is no longer valid, as Petitioners argue, then it is Congress which should re-evaluate its own legislative judgment.

only minimal procedural safeguards is that the States may be encouraged to create grievance mechanisms that do not protect the rights of prisoners. In addition, for a state remedy to be adequate, Congress may determine that the remedy should be of some real benefit to the federal courts.

Respondents' supplemental brief provides support for the argument that the Maryland Inmate Grievance Commission does little to assist the District Court in managing or reducing the number of complaints that are filed by prisoners. This may be the result of the Commission's initial investigation and screening procedures where 55 to 65% of all complaints received are dismissed without a hearing or written decision. Or, it may be because of the chaotic fact-finding and decision-making process which was the subject of a scathing dissent by Commissioner James V. Bennett in one case which appears in the Addendum to Respondents' brief. Also at fault may be the provision for review by the head of the Maryland prison system of all Commission decisions favorable to prisoners. His final decision can be based on evidence he gathers ex parte after the Commission hearing when the prisoner has no opportunity to rebut, present evidence of his own or even know of the Secretary's action. Clearly, in setting the standards for what is an adequate state remedy, Congress would want to consider the Maryland experience and compare it to other state procedures which appear to be more successful in resolving prisoners' grievances in a timely fashion.

III. CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that Petitioners' Motion Ne Recipiatur be denied.

Respectfully submitted,

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CERTIFICATION

I HEREBY CERTIFY that on this 3rd day of May, 1976, I mailed postage prepaid, a copy of the foregoing Respondents' Opposition to Motion Ne Recipiatur to Francis B. Burch, Esq., Attorney General, One South Calvert Street, Baltimore, Maryland 21202.

CHARLES F. MORGAN

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Supreme Court, U. S.
FILED
APR 21 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-44

ROBERT BURRELL, *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

SERGEANT V. D. SMITH, ETC., *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

GERALD McCLELLAN, ET AL., *Petitioners,*
v.
JAMES E. X. STOKES, *Respondent.*

DR. HAROLD M. BOSLOW, ET AL., *Petitioners,*
v.
JOHN WASHINGTON, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

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IN THE

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OCTOBER TERM, 1975

No. 75-44

ROBERT BURRELL, *Petitioner*,
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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

ARGUMENT

The Petitioners offer this Reply Brief in order to disperse some of the fog which the Briefs filed by Respondents and some amici have cast over this case. After squaring some misrepresentations of fact concerning the Maryland Inmate Grievance Commission,

Petitioners will comment upon some of the legal reasoning presented in those Briefs.[1]

I.

This Court's decisions generally do not require the exhaustion of State remedies prior to the institution of suit in federal court under 42 U.S.C. §1983. This rule, and its subsequent envolvement, was largely premised on the idea that one of the "main aims" of section 1983 was to provide "a remedy where state law was inadequate," *Monroe v. Pape*, 365 U.S. 167, 173, 81 S. Ct. 473, 477 (1961). In cases decided since, and in accordance with, *Monroe*, the available State remedies have been found to be ineffective.[2] *See Houghton v. Shafer*, 392 U.S. 639, 640, 88 S. Ct. 2119, 2120 (1968); *McNeese v. Board of Educ.*, 373 U.S. 668, 674-75, 83 S. Ct. 1433, 1437 (1963); *see also King v. Smith*, 392 U.S. 309, 312 n.4, 88 S. Ct. 2128, 2131 n.4 (1968); *Damico v. California*, 389 U.S. 416, 88 S. Ct. 526 (1967). In *Eisen v. Eastman*, 421 F.2d 560, 569 (2d Cir. 1969), *cert. denied*, 400 U.S. 841, 91 S. Ct. 82 (1970), the United States Court of Appeals for the Second Circuit, speaking through Judge Friendly, read these decisions

> as simply condemning a wooden application of the exhaustion doctrine in cases under the Civil Rights Act. Exhaustion of state administrative remedies is not required where the administrative remedy is inadequate, as in *McNeese*, or where it is certainly or probably futile, as in *Damico*, *Smith* and *Houghton*.

[1] References to Briefs will be cited as follows: Brief of Petitioners, "Pet. Br."; Brief of Respondents, "Resp. Br."; Brief of American Civil Liberties Union, et al., "ACLU Br."; Brief of the Center for Correctional Justice, "CCJ Br"; and, Brief of Amici Curiae in Support of Petitioners, "Pet. Amici Br."

[2] *See* pages 14-15 *infra* for an expanded discussion.

See also Gibson v. Berryhill, 411 U.S. 564, 575 n.14, 93 S. Ct. 1689, 1696 n.14 (1973); *Fuentes v. Roher*, 519 F.2d 379, 386 (2d Cir. 1975); *Bonner v. Coughlin*, 517 F.2d 1311, 1320 (7th Cir. 1975) (Stevens, J.); *Blanton v. State Univ. of N.Y.*, 489 F.2d 377, 383-84 (2d Cir. 1973).

The crucial difference between this case and *Monroe* and its progeny is the effectiveness of the available State remedy. Maryland's Inmate Grievance Commission (Commission) provides a prisoner with a means of having a complaint heard "promptly, fairly, and fully," *State v. McCray*, 267 Md. 111, 144, 297 A.2d 265, 282 (1972). The District Court found the Commission to be a "viable," "complete," "effective," and "swift" remedy, *McCray v. Burrell*, 367 F. Supp. 1191, 1204, 1205, 1209 (D. Md. 1973), and these are some of the characteristics which serve to distinguish this action from *Monroe* and other cases involving seriously defective State remedies. The Federal Judicial Center lauds the practice of exhausting an administrative grievance procedure prior to going into federal court, as is the custom in some jurisdictions. "[T]he grievance procedure may satisfactorily resolve the question," and, "resorting to the grievance procedure first avoids the risk that the issue may arise in a later judicial proceeding." The Center has also suggested that there might not be a "deprivation of civil rights under 42 U.S.C. §1983 until readily available, prompt administrative recourse is tried," Federal Judicial Center, Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts 20 (Tent. Report 1976).

Respondents and some amici have sought to tarnish the District Court's findings regarding the efficacy of the Commission. The Respondents charge that inmates cannot cross-examine witnesses at Commission hearings (Resp. Br. 85), have no pre-hearing discovery rights

(Resp. Br. 84), and that there are not any standards to guide the Secretary's review of a Commission order (Resp. Br. 77).[3] Quite to the contrary, an inmate has the right to cross-examine witnesses, subpoena evidence and witnesses, and review documentary evidence, Maryland Code (1957, 1971 Repl. Vol., 1975 Cum. Supp.) Art. 41, 204F(g), (h). That the Commission's and Secretary's discretion in performing their various tasks is not unbounded is also clear. *See* 59 Op. Att'y Gen. 438, 445-47 (Md. 1974).[4]

The Respondents try to downgrade the legitimacy of the Commission by asserting that 54% of the complaints received by the Commission are "dismissed without a hearing" (Resp. Br. 81).[5] This is an unfortunate choice of language, resulting in seriously misleading connotations. Complaints before the Commission

[3] Respondents (Resp. Br. 77) and an amicus (ACLU Br. 7 n.1) suggest that the Commission merely "advises" or "recommends" its findings to the Secretary. In fact, the Commission issues an *order*, which, if wholly adverse to the inmate, can only be appealed directly to Circuit Court, and which, if at all favorable to the inmate, *must* be reviewed within 15 days by the Secretary. Maryland Code (1957, 1971 Repl. Vol., 1975 Cum. Supp.) Art. 41, §204F(f)(1), (2). It should also be noted that if an inmate obtains relief through the Commission process the State may *not* appeal such a decision. *See* Code (1957, 1971 Repl. Vol.) Art. 41, §256; Board of Liquor License Comm'rs v. Leone, 249 Md. 263, 239 A.2d 82 (1968); Maryland Bd. of Pharmacy v. Peco, Inc., 234 Md. 200, 198 A.2d 273 (1964).

[4] It is further contended that the Secretary's "normal procedure" of reviewing a Commission order is to go beyond the record and solicit outside opinion (Resp. Br. 73, 75). This "normal procedure" was only employed once, and then in an exceptional situation involving a prison riot. *See* Washington v. Boslow, 375 F. Supp. 1298, 1301 (D. Md. 1974).

[5] An amicus also impugns the Commission's ability to dismiss a complaint (CCJ Br. 21). This friend of the Court further charges that a "major failure" of the Commission's procedure is the absence of a requirement that the reasons for action taken by the Commission be reduced to writing (CCJ

are not dismissed willy-nilly. Rather, an inmate is entitled to a hearing on any complaint over which the Commission has jurisdiction and which is not wholly lacking in merit on its face. Code (1957, 1971 Repl. Vol., 1975 Cum. Supp.) Art. 41, §204F(e), (f). These obstacles are certainly no more onerous than those faced by a plaintiff in federal court. *See* Fed. R. Civ. P. 12(b)(1), (2), (6). Furthermore, Respondents have improperly inflated the percentage of "dismissed" complaints by including in their computation complaints which are resolved to the inmate's satisfaction prior to hearing.[6] *Compare* Fed. R. Civ. P. 16.

Br. 22). Setting aside the question whether writings are essential to the effectiveness of a procedure, it must be noted that, in fact, the Commission does prepare a written opinion in every case it hears. An example of such a writing, in the customary four-part format, may be found in Addendum D to Respondents' Brief (Resp. Br. 1d-4d). In addition, whether or not a statute or regulation compels the Commission to issue a written opinion, the common law of Maryland requires State agencies to base their administrative actions on findings of fact, or an assignment of reasons for the result reached. If an agency fails to adhere to this standard, and takes any action which is not supported by the evidence in the record, Maryland's courts will remand the matter to the agency for findings of fact. *See* Baker v. Board of Trustees, 269 Md. 740, 747, 309 A.2d 768, 771-72 (1973); Adams v. Board of Trustees, 215 Md. 188, 195, 137 A.2d 151, 155 (1957).

[6] The Respondents have taken other liberties with their statistical offerings. They report (Resp. Br. 47) that only 11.4% of complaints received by the Commission were determined to be meritorious. Ignoring the question whether an 11.4% figure is of any significance, it must be pointed out that this percentage was obtained by dividing the number of complaints found to be meritorious (191) by the total number of complaints (1680) received by the Commission during a given time. Actually, the divisor in this fraction is much too large, as it includes 936 cases which were disposed of administratively. Subtracting these 936 complaints from 1680 leaves 744, which, when divided by 191, results in the more meaningful observation that in over 25% of the cases fully entertained by the Commission some relief was granted. For statistical data on the Maryland Inmate Grievance Commission, *see* chart contained in Pet. Br. 89 n.34.

While many of the suggestions offered by Respondents to improve the effectiveness of the federal courts' handling of prisoner claims, and to increase the effectiveness of the Commission as an adequate administrative remedy might appear liminally attractive, none have ever been proven in practice. It is suggested, for example, that "the [federal] courts can assign law students to investigate and evaluate prisoner claims" (Resp. Br. 56). How this approach would be more beneficial than having the five highly qualified professionals who comprise the Commission do the reviewing pursuant to "federal or State laws or constitutional requirements," subject to judicial review, is left unexplained. Code (1957, 1971 Repl. Vol., 1975 Cum. Supp.) Art. 41, §204F(e).

It is charged that the institution of a program to train prisoners as "jailhouse lawyers" would be an effective means of providing prisoners with legal assistance, and would result in the filing of non-frivolous cases (Resp. Br. 57-58). Once again, Respondents are silent about how such a system would better serve the interests of prison inmates — if it would work at all — than the Commission does at present, and will do in the future as it develops and matures.

Finally, the Respondents claim that the Commission cannot effectively resolve grievances until it provides "for genuine prisoner input beyond the filing of a complaint" (Resp. Br. 59). Are they suggesting that a responsive mechanism cannot be achieved until prisoners serve on the Commission? If this is so, why are Respondents so eager to gain instantaneous access to the federal courts, a forum which shares a common "defect" with the Commission, *i.e.*, there have not been any prisoners appointed to the federal bench.

After the workings of the Maryland Inmate Grievance Commission are realistically examined, what emerges is a clear picture of a State administrative body which deals effectively and fairly with inmate grievances. The procedural safeguards which are built into the system are more than adequate to ensure the evenhanded treatment of complaints. *See Washington v. Boslow*, 375 F. Supp. 1298, 1300-02 (D. Md. 1974); *McCray v. Burrell*, 367 F. Supp. 1191, 1200, 1202-05 (D. Md. 1973); *State v. McCray*, 267 Md. 111, 144, 297 A.2d 265, 282 (1972); Comment, 35 Md. L. Rev. 458, 460-64 (1976). The imperative need urged by Respondents for bypassing the State remedy on the grounds of non-responsiveness is not enhanced when it is realized that in the 37 instances between 1969 and 1973 where Respondent McCray filed federal court actions, the Court has never granted any of the relief prayed for. *See McCray v. Burrell, supra*, 367 F. Supp. at 1217-18 (Appendix A).[7]

II.

"The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law," *McKart v. United States*, 395 U.S. 185, 193, 89 S. Ct. 1657, 1662 (1969). Indeed, requiring exhaustion is the general rule. Thus it is no wonder that eminent commentators ask why "a 'federal right' under the Civil Rights Act [is] more deserving of immediate judicial protection than a federal right under the Administrative Procedure Act," and why "must federal administrative remedies be exhausted in circumstances in which state administrative remedies need not be exhausted." K.C. Davis, Administrative Law Treatise §20.01, at 646 (1970 Supp.); H.J. Friendly, Federal Jurisdiction: A

[7] Respondents assert that the "hopelessness and futility" of pursuing relief from the Commission is demonstrated by the fact that of 19 prisoner complaints alleging physical

General View 100 (1973). The reasons for demanding the exhaustion of administrative remedies, in general, have often been eloquently stated, *see, e.g., McKart v. United States, supra,* 395 U.S. at 193-95, 89 S. Ct. at 1662-63, and the necessity of exhausting State administrative remedies, in particular, has been a part of our law for many years, *Prentis v. Atlantic Coast Line Co.,* 211 U.S. 210, 29 S. Ct. 67 (1908). The stark contrast between the "careful articulation of the exhaustion requirement" in *McKart,* and the casual treatment accorded the exhaustion concept in some cases arising under the Civil Rights Act has not escaped the eyes of the commentators. *See* H. Hart & H. Wechsler, The Federal Courts and the Federal System 985 (2d ed. 1973).

While State prisoners should not be treated any differently than other civil rights plaintiffs, *Wilwording v. Swenson,* 404 U.S. 249, 251, 92 S. Ct. 407, 409 (1971), "the fact that [they] retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed," *Wolff v. McDonnell,* 418 U.S. 539, 556, 94 S. Ct. 2963, 2975 (1974). Consequently, they should not be exempted from exhausting an adequate State administrative remedy before seeking relief in federal court. The adequacy of the available remedy is the primary feature which serves to distinguish this case from others where no exhaustion was required. In addition, however, there

mistreatment by prison personnel, not one was found to be meritorious (Resp. Br. 22). This is far from surprising. There has only been one case in the United States District Court for the District of Maryland involving State prison officials where such an allegation was substantiated. There, three judgments returned in favor of the plaintiffs totalled only $600, and no punitive damages were awarded.

are other permissible considerations which make this rather cold distinction especially attractive in a prisoners' rights setting, as the reasons for requiring the exhaustion of State administrative remedies in the context of prisoner complaints are particularly compelling, H.J. Friendly, *supra,* at 105.

Treating State prisoners identically with other citizens is a laudable general rule, and in many situations the Constitution would not tolerate anything less. To the extent, though, that State prisoners *are* different from other groups of persons, they can, and should, be dealt with differently. *See Wolff v. McDonnell, supra,* 418 U.S. at 556, 94 S. Ct. at 2975 (1974); *McCray v. Burrell,* 516 F.2d 357, 376 (4th Cir. 1975) (Widener, J.). "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination," *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 489, 75 S. Ct. 461, 465 (1955), and only "invidious discrimination" offends the Constitution, *Ferguson v. Skrupa,* 372 U.S. 726, 732, 83 S. Ct. 1028, 1032 (1963). So long as a given procedure does not discriminate against State prisoners arbitrarily, but, rather, is predicated upon legitimate considerations, the Constitution will not be offended. The Constitution allows rationally based classification, and distinguishing between State prisoners and other potential civil rights plaintiffs for purposes of requiring exhaustion of State administrative remedies, where these remedies are adequate, makes both good sense and sound constitutional law.

Nowhere are the reasons for distinguishing the complaints of State prisoners from those of non-prisoners more eloquently stated than in this Court's opinion in *Preiser v. Rodriguez,* 411 U.S. 475, 491-92, 93 S. Ct. 1827, 1837 (1973) (emphasis supplied):

It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State. Since these internal problems of state prisons involve *issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems.* Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances.

See also McCray v. Burrell, 367 F. Supp. 1191, 1198 (D. Md. 1973). Judge Friendly has also spoken forcefully on this general point, in the course of advocating the sagacity of requiring the exhaustion of state *judicial* remedies.

> The relationship of the state to prisoners in its institutions is sufficiently different from its relations to other persons complaining of denial of civil rights guaranteed by the Constitution to warrant a requirement of initial invocation of state judicial remedies not usually imposed. These are people who have been adjudged guilty of breaking state criminal laws, often with very grave consequences

> to others. The state is in contact with them not merely daily but throughout the day — and the night as well. Their grievances are frequently of a sort that cannot be cured by prescription of a general rule but require determination of the facts of a specific incident. There are serious physical problems in hearing these cases in a federal court, usually many miles away, as distinguished from hearing by a state judge in a nearby county courthouse or in the prison itself.

H.J. Friendly, *supra,* at 107.

III.

This Court has recognized that the strength of our federal system of government depends in large part on an acute awareness of the sensitivity of federal-State relations, and the necessity of minimizing conflict between the two. The concept of "Our Federalism" represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States," *Younger v. Harris,* 401 U.S. 37, 44, 91 S. Ct. 746, 750-51 (1971). Although the procedural posture and specific facts in *Younger* were different from those present here, the underlying rationale which led to the *Younger* result applies with equal force to this case. "[D]eference to the principles of federalism" should be observed in the presence of an adequate State administrative remedy, *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 599, 95 S. Ct. 1200, 1206 (1975).[8] Requiring

[8] "The issue in the present case concerns directly a basic problem of American federalism: the relation of the Nation to the States in the critically important sphere of municipal law administration," Monroe v. Pape, 365 U.S. 167, 222, 81 S. Ct. 473, 503 (1961) (Frankfurter, J., dissenting).

State prisoners to seek relief through the Commission mechanism before instituting, if still necessary, a civil rights action in federal court, strikes a just balance between each governmental interest. The State's concern over its prisoners and correctional system will be accommodated, and the federal interest to ensure adherence to constitutional prescriptions is also guaranteed.

Section 1983 of the Civil Rights Act is not a "sovereign talisman,"[9] *see Paul v. Davis*, 44 U.S.L.W. 4337 (U.S. Mar. 23, 1976) (where this Court reversed an expansive interpretation of the substantive rights cognizable under section 1983), and in the absence of express statutory language to the contrary, general legal principles surrounding its administration should not differ from those applicable to other laws. While the legal arguments for demanding the exhaustion of adequate State administrative remedies are well founded, the practical considerations involved in prisoner cases are extraordinarily compelling. The staggering burden which prisoner civil rights cases place on the federal courts is well documented.

In a statement issued on January 3, 1976, Mr. Chief Justice Burger said that one-sixth of the cases on the civil docket of federal courts are prisoner petitions, "most of which could be handled effectively and fairly within the prison systems," *Chief Justice Burger Issues Yearend Report*, 62 A.B.A.J. 189, 190 (1976). The problem is one which has received the careful attention of the Federal Judicial Center, which has released an extensive report on the subject. *See* Federal Judicial Center, Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts (Tent.

[9] Wood v. Lucy, Lady-Duff Gordon, 222 N.Y. 88, 91, 118 N.E. 214 (1917) (Cardozo, J.).

Report 1976). The District Court also identified the formidable burdens which a non-exhaustion rule imposes on judicial administration, placing particular emphasis upon the situation prevailing in the United States District Court for the District of Maryland, and in the United States Court of Appeals for the Fourth Circuit, *McCray v. Burrell*, 367 F. Supp. 1191, 1193-94 (D. Md. 1973). "Federal judges should not be dealing with prisoner complaints which, although important to a prisoner, are so minor that any well-run institution should be able to resolve them fairly without resort to federal judges," *Chief Justice Burger Issues Yearend Report, supra*, at 190. These "very practical notions of judicial efficiency" cannot be ignored. "A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene," *McKart v. United States, supra*, 395 U.S. at 195, 89 S. Ct. at 1663.

IV.

The propriety of requiring the exhaustion of an adequate State administrative remedy prior to the institution of a federal suit brought by a State prisoner pursuant to 42 U.S.C. §1983 cannot be gainsaid. Maryland's Inmate Grievance Commission provides a forum where State prisoners can fairly air their grievances, and receive relief where warranted; the virtues of requiring the exhaustion of administrative remedies prior to the commencement of judicial action have been extolled since the *Prentis* decision in 1908, and apply at least as dynamically in State prisoner cases as in others where administrative relief is available; State prisoners constitute a unique class of citizens in which the State has an extraordinary interest, unsurpassed by any other group; our federal

mode of government, as expounded most recently in the *Younger* line of cases, establish that federal-State relations are particularly sensitive with regard to State prisoners, and ought not be exacerbated by the establishment of an unyielding rule of law which allows the States to be bypassed entirely in an area which is of paramount interest to them; and, the disproportionate attention which the federal courts have had to give State prisoner cases — so weighty a burden that the Chief Justice of the United States, the Federal Judicial Center, numerous federal judges, and commentators have all called for reform — is a very real impediment to the sound administration of justice. Each of these factors augur in favor of an exhaustion requirement in the face of an adequate State remedy — in unison they demand it.

The essential difference between the instant case and the *Monroe* line of decisions is the availability here of an adequate administrative remedy in the form of the Maryland Inmate Grievance Commission. In *Monroe* the complaint alleged "that 13 Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers." All of this, along with other subsequent indiscretions, was accomplished without a search warrant. *Monroe v. Pape, supra,* 365 U.S. at 169, 31 S. Ct. at 474. While it was unsuccessfully argued "that under Illinois law a simple remedy [was] offered for that violation and that, so far as it appears, the courts of Illinois [were] available to give petitioners . . . full redress," 365 U.S. at 172, 81 S. Ct. at 476, the *Monroe* fact pattern did not include any mention of an administrative remedy.

In the cases which follow *Monroe,* the same, or highly similar, situations prevailed. *See Wilwording v. Swenson, supra,* 404 U.S. at 250, 92 S. Ct. at 409 (impossible to determine whether administrative procedures existed, and, if so, which to pursue); *Houghton v. Shafer, supra,* 392 U.S. at 640, 88 S. Ct. at 2120 (requiring exhaustion would have been to demand a futile act); *McNeese v. Board of Educ., supra,* 373 U.S. at 674, 83 S. Ct. at 1437 ("[I]t is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court.").

Not allowing the States to play a meaningful role in the administration and improvement of their penal systems does more than cut sharply against the objective of fostering federal-State relations, as espoused in *Younger* and other cases arising in other than State prisoner contexts. If State prisoners are not required to initially seek relief through the Maryland Inmate Grievance Commission, the Commission's prestige and effectiveness will be seriously jeopardized. "[F]requent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures," *McKart v. United States, supra,* 395 U.S. at 195, 89 S. Ct. at 1663.

If the adequacy of State administrative remedies is not allowed to serve as a basis for requiring their exhaustion before resort to the federal courts is undertaken in civil rights actions, existing State administrative bodies will begin to atrophy, and a vital incentive to the States' improvement of their own remedies will be removed. *See* Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape,* 82 Harv. L. Rev. 1486, 1494 (1969). In one of his classic

dissenting opinions, Mr. Justice Brandeis acclaimed the soundness of encouraging the States to experiment "in things social."

> Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S. Ct. 371, 386-87 (1932) (Brandeis, J., dissenting).[10] *See also San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 50, 93 S. Ct. 1278, 1305 (1973); *Johnson v. Louisiana*, 406 U.S. 356, 386, 92 S. Ct. 1643, 1646 (1972) (Douglas, J., dissenting).

Maintaining and administering prisons is one of the oldest and most visible manifestations of social policy in which States engage, and recalls a familiar quotation from the writings and speeches of Winston Churchill: "The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country." Our 50 State laboratories must be encouraged to develop and refine methods for dealing with inmate complaints. While the Petitioners believe that Maryland has already achieved a viable administrative apparatus in the form of the Inmate Grievance Commission, it is also expected that the Commission will improve as it

[10] The present day validity of the majority's opinion in *New State Ice Co.* is highly dubious, and "belongs to that vintage of decisions which exhalted substantive due process by striking down state legislation which a majority of the Court deemed unwise," North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 164, 94 S. Ct. 407, 412 (1973), *overruling* Liggett Co. v. Baldridge, 278 U.S. 105, 49 S. Ct. 57 (1928).

evolves. Maryland pioneered the creation of an administrative mechanism responsive to prisoner complaints, and provided the impetus to her Sister States to do likewise. Now at least 23 States have instituted some form of inmate grievance procedure (Pet. Amici Br. 13-18 n.1; CCJ Br. 6-9, 16-18). This multitude of approaches is simply a reflection of the "complexity of the task" (CCJ Br. 9) before them. The States should not be inhibited from pursuing the search for the elusive "best answer." Extending the non-exhaustion standard of *Monroe* to cases where adequate State remedies exist will inhibit, if not completely squelch, all State activity in the direction of positive correctional reform.

During the 90-year interval between the enactment of Section 1 of the Ku Klux Act in 1871, 17 Stat. 13, which eventually became 42 U.S.C. §1983, and the Court's decision in *Monroe v. Pape, supra*, there is no evidence that anything but the usual exhaustion prerequisites applied to plaintiffs seeking relief under the federal law in federal courts. While a majority of the *Monroe* Court interpreted the legislative history of section 1983 as not requiring the exhaustion of inadequate State *judicial* remedies prior to the institution of a section 1983 action,[11] *Monroe* did not present the parallel question with regard to State *administrative* remedies. Indeed, however one may construe the legislative history of section 1983, it is certain that it cannot support the notion that Congress contemplated a non-exhaustion requirement regarding State *administrative* remedies. The reason for this is pellucid: there were no administrative remedies in 1871 which the Congress could have been concerned with. The concept of an "administrative

[11] *Compare* that portion of Mr. Justice Frankfurter's cogent dissenting opinion which criticizes the majority's interpretation of the legislative history, 365 U.S. at 224-37, 81 S. Ct. at 504-11.

remedy," as we know it today, was totally foreign to the post-Civil War period. Therefore, whatever *Monroe* or the legislative history of section 1983 stands for, neither can preclude, *ex proprio vigore*, the imposition of an exhaustion requirement in the presence of an adequate State administrative remedy.

Petitioners have urged that this Court's decisions from and after *Monroe* do not allow federal civil rights plaintiffs to seek judicial relief in the first instance where there exists an adequate State remedy capable of providing substantial relief. Although Petitioners earnestly believe that the foregoing statement is in perfect harmony with the law, if it is determined that the cases cannot be read to admit of such a precept, Petitioners submit that a "new rule" requiring exhaustion in these circumstances be adopted, even if some prior decisions need to be partially overruled in the process. This "new rule" which Petitioners suggest is really not a "new rule" at all, but simply a reaffirmation of the rule which prevailed for 90 years prior to *Monroe*. "The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-08, 52 S. Ct. 443, 447-48 (1932) (Brandeis, J., dissenting) (footnote omitted).

The lessons of experience have amply demonstrated the correctness of requiring the exhaustion of adequate State administrative remedies prior to the institution of federal suit, and there exists no express statutory command to the contrary. While Petitioners do not think it necessary, if the Court believes that some earlier decisions cannot stand consistently with such a rule, to that extent they should be modified or overruled.

"It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination, and the test of experience," *Barden v. Northern Pac. R.R.*, 154 U.S. 288, 322, 14 S. Ct. 1030, 1036 (1894).

CONCLUSION

For the reasons expressed above, and in the Briefs of Petitioners and Amici Curiae in Support of Petitioners, the decision of the United States Court of Appeals for the Fourth Circuit must be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-44

ROBERT BURRELL, *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

SERGEANT V. D. SMITH, etc., *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

GERALD McCLELLAN, et al., *Petitioners,*
v.
JAMES E. X. STOKES, *Respondent.*

DR. HAROLD M. BOSLOW and
DR. DOMINGO C. SORONGON, *Petitioners,*
v.
JOHN WASHINGTON, *Respondent.*

BRIEF OF THE CENTER FOR CORRECTIONAL JUSTICE, AMICUS CURIAE

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JOHN WASHINGTON, *Respondent.*

BRIEF OF THE CENTER FOR CORRECTIONAL JUSTICE, AMICUS CURIAE

INTEREST OF AMICUS *

The Center for Correctional Justice (hereinafter referred to as the Center) is a non-profit corporation funded by private foundation and federal grants. The Center was established in 1971 by a group of lawyers, correctional officials and ex-offenders to promote peaceful, non-judicial methods of resolving grievances in correctional institutions. Since its inception, a substantial increase in the number of functioning administrative grievance mechanisms has provided the Center with opportunities for extensive study and direct involvement in the design and implementation of correctional grievance procedures.

Throughout the past five years the Center has worked closely with a wide variety of organizations to further the development of effective grievance mechanisms in correctional institutions, including the American Arbitration Association, The American Bar Association's Commission on Correctional Facilities and Services, the American Correctional Association, the National Association of Attorneys General and the National Council on Crime and Delinquency. In addition, the Center has provided direct technical assistance in the evaluation, design and implementation of inmate grievance mechanisms to correctional administrators in California, Colorado, Delaware, Georgia, Kansas, Massachusetts, New Jersey, New York, Ohio, and South Carolina. The Center also has given assistance in the drafting of legislation for the enactment of correctional grievance mechanisms in California, Massachusetts, Nebraska, New York and Texas.

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* Letters of consent from counsel for petitioners and counsel for respondents have been filed with the Clerk of the Court.

In a study conducted in 1974 for the Juvenile Justice Standards Project of the Institute of Judicial Administration and the American Bar Association, the Center assessed the comparative impact of mechanisms for the handling of grievances in institutions for juveniles. To gather initial data, the Center surveyed over 900 federal, state and private institutions and agencies throughout the country. Based on responses to the survey, Center staff identified and visited 16 institutions in eight states with the most innovative mechansms. This study gave the Center an opportunity to evaluate and compare different types of mechanisms. See J. Keating, K. Gilligan, V. McArthur, M. Lewis and L. Singer, *Seen But Not Heard: A Survey of Grievance Mechanisms in Juvenile Correctional Institutions* (1974) [hereinafter cited as Keating, *Seen*].

In a subsequent study conducted for the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration (LEAA), the Center visited correctional institutions for adults in 14 states and the Federal Bureau of Prisons to examine the operations of various types of grievance mechanisms including formal procedures, ombudsmen and inmate councils. At each site, records of the mechanism were examined and evaluated; staff and inmates were interviewed; and a questionnaire was administered to a ten percent randomly selected sample of the inmate population. These techniques were designed to elicit, among other things, staff and inmate knowledge of the grievance procedure, inmate willingness to use it, assessment of its effectiveness, ideas for its improvement, analysis of its strengths and weaknesses, and guidance for its introduction elsewhere. The research for this study gave the Center an addi-

tional opportunity to assess and compare the effectiveness of existing administrative means of handling inmates' grievances. J. Keating, V. McArthur, M. Lewis, K. Sebelius and L. Singer, *Toward a Greater Measure of Justice: Grievance Mechanisms in Correctional Institutions* (1975) [hereinafter cited as Keating, *Toward*].

In addition to its research efforts, the Center provided design and implementation assistance to the California Youth Authority which, in 1974, introduced an innovative grievance procedure for inmates under its supervision. LEAA recently has designated this mechanism as one of its "Exemplary Projects" for the current fiscal year. The Center is presently involved in an LEAA and Ford Foundation-sponsored project to replicate the California Youth Authority mechanism in four different locations and/or correctional environments, including Colorado, New York and South Carolina adult corrections and California parole.

Because of its deep involvement in the development of administrative grievance mechanisms for correctional institutions, the Center is concerned about the impact of the imposition of a requirement for the exhaustion of administrative remedies prior to the filing of prisoners' § 1983 suits. Any reexamination of the rule articulated in *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973), should include consideration of current progress in the development of correctional grievance mechanisms. The Center has prepared this brief to provide the Court with whatever information and insights resulting from its research and experience may be helpful in its consideration of the exhaustion requirement within the context of this case.

THE QUESTION PRESENTED

Whether state prisoners who claim deprivation of civil rights arising from conditions of incarceration must exhaust state administrative remedies prior to bringing suit under the 1871 Civil Rights Act, 42 U.S.C. § 1983.

SUMMARY OF ARGUMENT

In the view of *amicus,* the imposition of an exhaustion requirement at this time would endanger one of the most innovative and positive developments in corrections in recent times. Correctional administrators are experimenting presently with a wide variety of models for the administrative remedy of prisoners' grievances. Some of the remedies developed to date represent an advance not only for corrections, but also for the broader field of administrative law. The imposition of an exhaustion requirement could well curtail further experimentation by endorsing what is likely to become the lowest common denominator among correctional grievance mechanisms.

Should a requirement to exhaust administrative remedies be imposed, the Center respectfully requests the Court to articulate specific standards for adequacy and timeliness. The suggested standards, derived from the Center's research and experience in designing and implementing procedures, include, as a minimum, written responses with reasons, tight time limits, hearings and some form of independent outside review. Other standards suggested by the Center as critical to the creation of fair and effective administrative remedies include the participation of prisoners and line staff in the operation of the mechanisms, protection from re-

prisal, some form of representation and an impartial method for settling jurisdictional disputes.

The Center's research indicates that mechanisms which do not meet these standards are unlikely to respond fairly and effectively to the wide range of prisoners' grievances. Amicus further submits that ineffective mechanisms will delay, rather than reduce, recourse to the courts.

The Maryland Inmate Grievance Commission fails to measure up to the standards identified by the Center as essential. Because of these failings, it would be inappropriate to require respondents in this case to exhaust the available administrative remedy before seeking relief in federal court under 42 U.S.C. § 1983.

ARGUMENT

I. THE IMPOSITION OF A REQUIREMENT THAT PRISONERS EXHAUST ADMINISTRATIVE REMEDIES BEFORE BEING GRANTED ACCESS TO THE FEDERAL COURTS WOULD BE PREMATURE.

When the Center conducted a recent survey to assess development of correctional grievance mechanisms, it found that a substantial majority of existing grievance mechanisms had been established since 1971. McArthur, "Inmate Grievance Mechanisms: A Survey of 209 American Prisons," *Federal Probation,* December 1974, p. 41. Of those mechanisms possessing more permanent characteristics, such as a written rule or regulation describing the procedure, records, or a requirement for responses, the overwhelming majority had been created within the past three to four years.

The history of New York State's recent attempts to create effective, responsive grievance mechanisms in its correctional system is illustrative. The New York

Division for Youth created an ombudsman program for its institutions in August, 1972. See Silbert and Sussman, *The Rights of Juveniles Confined in Training Schools and the Experience of a Training School Ombudsman,* 40 Brooklyn L. Rev. 605 (1974). In 1972 the New York State Department of Correctional Services established an internal "Inspector General." State of New York Department of Correctional Services, *Administrative Bulletin #59,* May 22, 1972. Also in 1972, the Commission of Correction was reorganized to oversee state correctional institutions and prevent abuse of inmates; that Commission was reconstituted and given broader powers in 1975. N.Y. Correction Law § 46. Finally, in 1975, legislation mandating the establishment of a grievance mechanism that included inmate participation and outside review of grievances in state correctional institutions was passed and signed into law by the Governor. N.Y. Correction Law § 139. The last statute went into effect on February 5, 1976. The State of New York obviously is still searching for the most effective way to handle the grievances of inmates.

New York's experience testifies to the readiness of correctional administrators to attempt to create administrative grievance mechanisms. An exhaustion requirement is not necessary to encourage administrators to act, since they already are doing so in great numbers. In fact, the reasons for experimentation advanced by administrators have little to do with avoiding litigation. The Center's survey of grievance mechanisms in adult institutions indicated that the reasons for instituting such mechanisms given by the wardens of the 209 institutions responding had little to do with considerations related to an exhaustion requirement:

> The most common reasons in order of frequency, were 'to provide all inmates opportunities to voice grievances and receive an official response' (143 respondents), 'to assist management by identifying institutional problems' (136), 'to reduce inmate frustration' (132), and 'to aid in rehabilitation of inmates' (126). Reduction of violence and litigation were given far less often—only 60 to 50 times, respectively. McArthur, *supra,* at 44.

While the amount of experimentation with administrative procedures in corrections is considerable, the variety of experimentation is even more impressive. Iowa has a correctional ombudsman created by and answerable to the legislature, I.C.A. § 601G; Minnesota has a correctional ombudsman created by the legislature and answerable to the Governor, Minn. Stat. 1973 Supp. §§ 241.407-241.45; Ohio had (and on the basis of two years' experience now has done away with) an ombudsman answerable only to the corrections department, Department of Corrections Administrative Regulation 847; the Bureau of Prisons has an internal, multi-level procedure, Federal Bureau of Prisons Policy Statement 2001.6A, *Administrative Remedy of Complaints Initiated by Offenders in Bureau of Prisons Facilities,* October 18, 1974; Wisconsin has a multi-level procedure that involves an assistant to the State Attorney General as a final level of review, Division of Corrections, Department of Health and Social Services Regulation, *Inmate Complaint Review System,* November, 1972, rev'd January, 1973; the California Youth Authority has a multi-level procedure that submits grievances to volunteer professional arbitrators from the general community, California Youth Authority, *Principles, Ward Grievance Procedures,* September 22, 1975; New York now has a multi-level procedure that refers complaints to a Commission of Correction, which, in turn, may delegate its review to arbitrators from the general community, N.Y. Correction Law § 139; the State of Washington had (and has now discontinued) an elaborate and much publicized scheme of inmate self-government that included a procedure for handling both individual and group complaints; South Carolina has an internal ombudsman, a highly developed institutional and departmental inmate council system and is preparing to introduce an experimental multi-level procedure with arbitration.

The seeming confusion of approaches is simply an indication of the complexity of the task. In a rare burst of innovation and experimentation, correctional administrators are searching for answers to a difficult problem. This is not the time to stifle that search by imposing a requirement for exhaustion that well may have the effect of endorsing the lowest common denominator and, thereby, ending further efforts to create truly effective mechanisms.

Another reason for avoiding judicial action that might hamper or retard the development of grievance mechanisms is the place that experimentation in corrections is beginning to take in the whole developing field of administrative law. Current testing of the ombudsman concept in corrections is providing unique information about the application and limits of this form of administrative remedy; experiments with the application of mediation and arbitration in correctional grievance mechanisms well may point the way to future developments in other contexts. See, *e.g.,* L. Singer and L. Nader, *Dispute Resolution in the Future: What are the Choices?* (prepared for the California State Bar Association 1975).

If the Court imposes a requirement for exhaustion at this time, it may discourage experimentation and establish untested standards that are questionably related to the development of inmate grievance mechanisms which are fair and effective.

II. IF AN EXHAUSTION REQUIREMENT IS TO BE IMPOSED, THIS COURT SHOULD SET FORTH MINIMUM STANDARDS OF FAIRNESS, ADEQUACY AND TIMELINESS.

If the Court imposes a requirement for the exhaustion of state administrative remedies in this case, it should do so only while establishing standards for adequacy and timeliness that ensure, within the unique correctional context, the development of procedures that are both fair and effective.

The unique aspects of the prison environment are well known to the Court; they formed a substantial consideration in the Court's earlier consideration of an exhaustion requirement in *Preiser, supra:*

> For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State. . . . What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State. 411 U.S. at 492.

The total nature of the prison system means inevitably that the grievances of inmates will include a broad range of matters varying in importance from fundamental questions of constitutional significance to objectively petty issues that are perceived as important only by the grievants. This amalgam of grievances has been well represented in prison litigation in

the federal courts. Compare, for example, *Jackson* v. *Bishop,* 404 F.2d 571 (8th Cir. 1968) (inmate's *pro se* § 1983 action challenging corporal punishment administered in Arkansas state penitentiaries as a violation of the Eighth Amendment) with *Sparks* v. *Fuller,* 506 F.2d 1238 (1st Cir. 1974) (inmate's § 1983 action to prevent the eviction of three unauthorized pet cats).

Another inherent aspect of the correctional environment is the powerlessness of an inmate vis-à-vis the prison administration. In contrast to an employee who may be required to exhaust a contractual grievance mechanism and who proceeds through all levels of the grievance procedure with the union's support, bargaining power and financial resources, an inmate stands alone and isolated. The inmate, moreover, frequently must seek relief through a procedure entirely in the hands of staff and administrators, whose policies and actions generally are the source of complaint. The Court noted some results of this condition in *Wolff* v. *McDonnell,* 418 U.S. 539, 562 (1974):

> [I]nmates are closely supervised and their activities controlled around the clock. Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace.

Considering these two aspects of prison life—its all-encompassing nature and the powerlessness of inmates—an effective grievance mechanism for corrections must take extraordinary measures not only to be fair objectively, but also to be perceived as fair by inmates. A mechanism that does not meet this standard of fairness is not likely to be effective. As the National Advisory Commission on Criminal Justice Standards and Goals observed in its volume on *Corrections* at 57 (1973):

> A formal procedure to ensure that offenders' grievances are fairly resolved should alleviate much of the existing tension within institutions . . . Peaceful avenues for redress of grievances are a prerequisite if violent means are to be avoided. Thus all correctional agencies have not only a responsibility but an institutional interest in maintaining procedures that are, and appear to offenders to be, designed to resolve their complaints fairly.

Through research conducted over the past three years in correctional institutions for adults and juveniles throughout the country, the Center for Correctional Justice has identified certain standards that it believes are essential to the creation of grievance procedures which are both fair and effective. These standards include:

(1) *Written responses with reasons.* Every complaint submitted through a grievance procedure should receive a response in writing. If the complaint is denied, the response should include reasons for denial. Without this requirement, it is impossible for grievants or other interested parties to a complaint to know the grounds on which the decision was based. The reason for such a standard, especially within the correctional context, has been well articulated by this Court in *Wolff* v. *McDonnell, supra:*

> . . . [T]he provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. 418 U.S. at 565.

Most existing correctional grievance mechanisms recognize the importance of this element and provide for

written responses, with reasons, to all grievances. See, *e.g.,* Federal Bureau of Prisons Policy Statement 2001.6A, *Administrative Remedy of Complaints Initiated by Offenders in Bureau of Prisons Facilities,* October 18, 1974; and California Youth Authority, *Principles, Ward Grievance Procedures,* September 22, 1975.

(2) *Time Limits.* Brief, enforceable time limits are essential at every level of an inmate grievance procedure. The National Advisory Commission on Criminal Justice Standards and Goals has expressed in concrete terms what it considers an acceptable, reasonable standard for timeliness:

> Where complaints are filed against conditions of correctional control or against the administrative actions or treatment by correctional or other government authorities, offenders may be required first to seek recourse under established administrative procedures and appeals and to exhaust their administrative remedies. Administrative remedies should be operative within 30 days and not in a way that would unduly delay or hamper their use by aggrieved offenders. *Corrections* 23 (1973).

The Center's research has corroborated the judgment of the National Advisory Commission. In its survey of innovative grievance mechanisms in correctional institutions for adults, the Center found that the ability of a mechanism to provide "fast answers" was a key characteristic in determining whether inmates used and trusted available mechanisms. See Keating, *Toward,* at 31.

Examples of grievance procedures that embody enforceable time limits at each step include the Federal

Bureau of Prisons Administrative Remedy Procedure, *supra* (failure to respond construed as denial of grievance with right to appeal to the next step); and the California Youth Authority Ward Grievance Procedure, *supra* (lack of a response within prescribed time period entitles grievant to proceed to next level of review).

The need for what may appear, at first glance, to be unseemly haste arises from the peculiar nature of correctional institutions. A correctional grievance procedure must respond to complaints about the application of minor housing unit rules and customs, as well as those involving constitutional issues. While a procedure requiring five or six months may seem reasonable for the latter type of case (although some of these, too, will require more timely action), it would be "untimely" for the less substantial matters that constitute the bulk of grievances submitted by aggrieved inmates, such as complaints about inadequate nutrition or medical care.

Procedures also should have special provisions for emergency grievances. The Bureau of Prisons procedure, *supra,* establishes a 48-hour limitation on the reply to a "complaint . . . of an emergency nature [that] threatens the inmate's immediate health or welfare"; the California Youth Authority, *supra,* provides for prompt review by the appropriate official "where there is a critical time factor and action must be taken before a regular grievance hearing and appeal can be held."

(3) *Outside Review.* Another critical standard for the creation of grievance mechanisms that are fair (and adequate from the perspective of prisoners) is

the review of grievances by some person or agency independent of the correctional agency. The need for impartial review within the framework of an administrative remedy is not unique to corrections, nor does the requirement for outside review necessarily impugn the motives of correctional administrators. See *Morrissey* v. *Brewer,* 408 U.S. 471, 486 (1972); *Goldberg* v. *Kelley,* 397 U.S. 254, 269 (1970). The requirement simply reflects the reality of prison life, where the quality of power exercised by administrators and staff over prisoners is so absolute that any administrative procedure created to handle inmates' grievances necessarily must be surrounded with safeguards.

It is not sufficient simply to provide for review by extra-institutional personnel who are hired by and responsible to the department, for many grievances will involve the substance or application of *departmental* policies and regulations. This fact has led observers of correctional grievance mechanisms to stress consistently the need for some sort of independent administrative review of prisoners' grievances. See, *e.g.*, S. Krantz, R. Bell, J. Brant, M. Magruder of the Center for Criminal Justice, Boston University School of Law, *Model Rules and Regulations on Prisoner Rights and Responsibilities* 203 (1973). See also, the Academy for Contemporary Problems, the Group for the Advancement of Corrections, *Toward a New Corrections Policy: Two Declarations of Principles* 10 (1974); National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 57 (1973); National Association of Attorneys General, Committee on the Office of Attorney General, *Special Report: Prison Grievance Procedures* 14 (1973); National Council on Crime and Delinquency, *Model Act on Rights of Pris-*

oners 18 (1972); T. Fitzharris, *A Report to the Assembly Interim Committee on Criminal Procedure: The Desirability of a Correctional Ombudsman* 44 (1971).

Recognition of the need is more than theoretical. Mechanisms in at least nine states (California, Connecticut, Illinois, Iowa, Maryland, Minnesota, New York, North Carolina, and Wisconsin) already provide for the review of grievances by individuals or groups independent of the correctional system, while like mechanisms are being introduced in Colorado, South Carolina and California youth parole.

The Center recognizes that it is not necessary for the opinion of the independent body to be binding on the corrections department for the system to be effective. In California and New York, for example, the head of the corrections system may reject the recommendation of the outside arbitrator; and conclusions of the ombudsman traditionally have been advisory. It is the independence and fairness of the outside reviewing body and the good will of the administrators of the correctional system, rather than the threat of binding sanctions, that make procedures effective.

(4) *Hearings.* The importance of a hearing as an integral component of an "adequate" administrative remedy has long been recognized. See, e.g., *Goss* v. *Lopez,* 419 U.S. 565 (1975); *Goldberg* v. *Kelly, supra; Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306 (1950).

The requirement is no less applicable to corrections, where such a hearing, in addition to meeting mandated standards of procedural adequacy, may also serve to promote a climate of justice and fairness. D. Fogel, *"We Are the Living Proof": The Justice Model for Corrections* 204 ff, (1975).

Virtually all existing correctional grievance mechanisms provide some form of hearing at one or more levels of the procedure, ranging from a formal arbitration hearing in the California Youth Authority procedure, *supra* at 6-15, to a simple interview with an ombudsman/investigator in Minnesota, see Minn. Stat. 1973 Supp. § 241.44, and Connecticut, see *Agreement Between the Connecticut Department of Correction and the Hartford Institute of Criminal and Social Justice,* September 12, 1973.

The Center's research, corroborated by its operational experience, points to another element closely related to the requirement for a hearing, that well may be essential to the creation of a credible and effective grievance mechanism, *i.e., participation by inmates and line staff in the operations of a procedure.* Such participation serves not only to enhance the credibility of a mechanism but also ensures that most people in an institution will be aware of the existence and mechanics of a procedure. Inmate and staff participation has the further advantage of enabling those people who must live with a particular solution to share a role in developing it.

In practice, a number of jurisdictions have included this element in their mechanisms. The California Youth Authority, *supra,* requires all institutions under its jurisdiction to grant inmates and staff meaningful participation in resolving grievances; most have done so by creating grievance committees with equal numbers of elected inmates and staff as the first level at

which grievances are decided. The New York Correction Law, § 139.1 requires grievance resolution committees "to be established in each institution, consisting of five persons, four of whom shall be entitled to vote, two of whom shall be inmates of such correctional institution, and a non-voting chairman." In Wisconsin, wardens have discretion to refer complaints to a complaint advisory board consisting of two staff members and two inmates. Division of Corrections, Department of Health and Social Services, Regulation, *supra.*

The Center's comparative analysis of grievance mechanisms indicates strongly that such participation, either as a contact point with the procedure (*e.g.,* through the use of inmate grievance clerks) or as a level of review, may be crucial in determining the readiness of inmates to use a grievance procedure. For example, in the California Youth Authority, where participation is an integral feature of the procedure, two-thirds of the inmates surveyed indicated that they would use the available grievance mechanism if they had a serious complaint about an institutional policy or unfair treatment by a staff member. The responses to the same questions of inmates surveyed in the Atlanta Penitentiary of the Federal Bureau of Prisons, where there is no element of participation in the available mechanism, indicated that very few (less than five percent) would use the Bureau of Prisons procedure to complain about institutional policy or unfair staff treatment. See Keating, *Toward*, at 28.

While research on the element of participation is not yet conclusive, it does seem to indicate that such participation well may be an important part of the

effort to create fair, effective and, hence, adequate administrative grievance procedures in corrections.

Other design principles, while important, are less central than those discussed above. These include protection of grievants and witnesses from reprisals and representation of grievants by other inmates, prison staff, or outsiders. There should also be some objective method of determining whether a specific grievance comes within the jurisdiction of the procedure. To date most mechanisms have defined grievances broadly, thereby including the entire gamut of inmate problems. Whatever the scope of the procedure enacted, there must be a means to challenge the exclusion of particular complaints. The settling of jurisdictional disputes (for example, distinguishing disciplinary matters from grievances) should not be left to the unreviewable discretion of administrators.

These, then are some of the standards that the Court should consider, if it decides to impose a requirement for exhaustion of state administrative remedies on prisoners who wish to file § 1983 suits. Certainly, written responses with reasons, tight time limits, outside review and hearings are indispensable standards; participation well may be critical; and protection from reprisal, some form of representation and an objective method for determining jurisdictional disputes are extremely important.

An additional consideration remains: one principal reason for establishing an exhaustion requirement is the desire to reduce the quantity of frivolous prisoners' civil rights suits brought in federal courts. Judicial leaders have voiced repeatedly their concern over the growing volume of prisoner petitioners on the civil

dockets of federal courts. See, *e.g.*, W. Burger, *The Condition of the Judiciary: Year-end Reports,* January 3, 1976. The real focus for this justified concern, however, has not been prisoner petitions in general but rather those complaints related to daily living that consume an enormous amount of judicial time in sifting through numerous claims which, although often important to the petitioner, do not state a cause of action under 42 U.S.C. § 1983.

It is not enough for an administrative grievance mechanism simply to identify and dismiss "frivolous" grievances, *i.e.*, those that are questionably actionable under § 1983 or not actionable at all. An inmate whose complaint has been summarily *dismissed* by the administrative mechanism is then free immediately to petition a federal court for a hearing. For example, in the Maryland grievance system, where a substantial proportion of grievances are dismissed without resolution, there is nothing to prevent those complainants from submitting petitions to the nearest federal court, whether or not an exhaustion requirement exists.

It should be recognized that only an administrative mechanism that responds effectively to the minor complaints of inmates as well as to their major ones will reduce the volume of § 1983 petitions in federal courts. Accordingly, the Center reemphasizes that, to be effective, a grievance procedure in corrections must be objectively fair and be perceived as fair by inmates and submits that the standards discussed above are critical to the creation of fair administrative mechanisms.

III. THE MARYLAND INMATE GRIEVANCE COMMISSION PROCEDURE IS NEITHER ADEQUATE NOR TIMELY AND SHOULD NOT BE THE SUBJECT OF AN EXHAUSTION REQUIREMENT.

The Inmate Grievance Commission [hereinafter referred to as the "Commission"] is the key step in Maryland's three-stage grievance procedure. The Commission's five members are appointed by the Governor while the Executive Director of the Commission is appointed by, and serves at the pleasure of, the Secretary of Public Safety and Correctional Services [hereinafter referred to as the "Secretary"]. An inmate with a grievance must forward it first to the Executive Director, who may dismiss any complaint "wholly lacking in merit," Ann. Code of Md. Art. 41, § 204F(e). If accepted, a grievance is heard by the Commission, which subsequently publishes its findings and recommendations. Any grievance the Commission finds meritorious in whole or part is reviewed by the Secretary, who has 15 days to approve, disapprove, or modify the decision. A grievant may appeal the final decision of the Secretary to the nearest Maryland circuit court.

Any inmate grievance procedure, providing a remedy to men and women who are under the complete control of the state, must be examined with special care for safeguards that prevent subversion of the process. This is not an idle concern, as illustrated by the dissent of James V. Bennett, Maryland Grievance Commission member and former director of the Federal Bureau of Prisons, in the case of William Bryant [reproduced as Addendum D to the Brief of Respondents]. Commissioner Bennett's account of the cavalier treatment of a grievant's claim of denial of due process demonstrates the gap that may exist between the theoretical

structure of a grievance mechanism and its actual operations.

While at first glance a reasoned, orderly mechanism for settling inmate complaints, the Maryland procedure does not conform to many of the standards described above as essential to an adequate and timely grievance mechanism. Some of the flaws are due to the design of the system as currently structured in Ann. Code of Md. Art. 41, § 204F and reveal themselves in the recorded operations of the grievance procedure. When measured against these standards, *supra*, the weaknesses of the Maryland procedure can be identified readily:

(1) *Written responses with reasons.* A major failure of the Maryland procedure is the absence throughout of a *requirement* for written statements of the reasons for actions taken. When the Executive Director dismisses a case, he need not specify his reasons for dismissal. The Commission, while empowered to issue orders, is not required to explain its reasoning. This omission has led, at least occasionally, to a lack of deliberation about the merits of particular cases among the members. See, *e.g.*, the *Bryant* case, *supra*. The Secretary may affirm, reverse or modify the Commission's order; he is not required to give reasons for doing so.

(2) *Time Limits.* The Maryland grievance procedure is essentially an open-ended one: when a complainant submits a grievance, he does not, and can not, know how many days it will take to exhaust the procedure. He knows only that Commission hearings are to be held "as promptly as practical." Once a hearing has been held, there is no time limit within which the Commis-

sion must issue an order. Only at the final level of the procedure, the Secretary's response, is there a specific time limit, 15 days. The only other time limit in the procedure involves dismissals, which must be returned to the grievant within 60 days. Considering the importance of the timeliness standard for the creation of a fair and effective procedure, the Maryland procedure is seriously deficient.

The Commission is slow in practice as well as in theory. From June 1, 1972, to June 18, 1973, the Commission issued a total of 238 decisions. The median time between the filing of grievances and final orders was five months. In the 127 cases decided in the later period from November 19, 1973, to February 20, 1974, the median time between the filing and a decision had increased to six months or 24.8 weeks. This figure decreased to three months or 13.6 weeks in the period from October 17, 1974, to October 17, 1975. Brief of Petitioners, pp. 36-37.

Far more sobering than such general statistics are the facts of individual Maryland cases. For example, on September 25, 1972, one inmate filed a complaint about inadequate medical treatment for gunshot wounds suffered outside the prison. A hearing, held on November 29, 1972, was continued until December 13, 1972. While an interim order for a hospital examination was issued on December 4, 1972, a final order in the case was not issued until April 26, 1973. Brief of Defendant, Appendix p. 301a, *McCray* v. *Burrell*, 367 F. Supp. 1191 (D. Md. 1973). This grievance, involving a medical emergency, required seven months from submission to final order. For an inmate with a broken bone or a bleeding wound or an aggravating

illness, a system that provides answers and assistance seven months later is both inadequate and untimely.

(3) *Outside review.* The Maryland procedure initially seems to conform to this standard, but closer scrutiny reveals two serious flaws. The first is that the Commission itself does not perform the function of *review*. Rather, as petitioners admit, "the position of the Inmate Grievance Commission is similar to that of a trial court in which certain of its decisions are subject to mandatory review." Brief of Petitioners, p. 31. The review of Commission decisions is conducted, of course, by the Secretary of the corrections department.

A second flaw is that many non-litigable grievances are dismissed with no opportunity for outside review. The Executive Director makes virtually all administrative dismissals. Brief for Defendant, Appendix pp. 294a-295a, *McCray* v. *Burrell,* 367 F. Supp. 1191 (D. Md. 1973). These come after an investigation made by contacting "an institutional representative who has been assigned for these purposes" and who "also [is] the person who represents the institution's position to the Commission at the hearing." *Id.* pp. 302a-303a. Dismissals "constitute the final decision of the Secretary." Art. 41, § 204F(f)(1). This would be less crucial were the Executive Director an "outside" reviewer, but, unlike the Commissioners, he is appointed by and serves "at the pleasure of the Secretary." Art. 41, § 204F(b).

There is no way to challenge an administrative dismissal short of court review. That legitimate grievances sometimes are shunted aside is apparent from a single example; one inmate filed a complaint containing, among others, the following allegations:

> I'm denied 'No Censorship of Outgoing Mail' in accordance with Guajardo versus McAdams, 349 F. Supp. 211 (Southern District of Texas 1972) I am to mail my letters without censorship, which is being denied me.
>
> In accordance with Wright versus McMann, 460 E. [sic] 2nd 126 (2nd Cir. 1972) 'No punishment disproportionate to the offense (and therefore cruel and unusual).' I was put into a cell with no bed, blanket, sheet—just a sink and toilet and I had all clothes taken from me. Brief for Defendant, Appendix pp. 287a-294a, *McCray* v. *Burrell,* 367 F. Supp. 1191 (D. Md. 1973).

The Executive Director dismissed the complaint. Asked if the case had been investigated, he replied, "No, because I don't consider he ever filed a specific grievance." *Id.* p. 291a.

(4) *Hearings.* The hearings actually provided by the Maryland Commission are adequate. The system fails to meet the Center's suggested standard, however, by failing to provide hearings in over 50 percent of the grievances submitted. Research on its own grievance procedure conducted by the California Youth Authority indicates strongly that inmate satisfaction with a grievance procedure may be more closely associated with the opportunity to express one's grievance in a hearing than with the favorableness of the response. California Youth Authority Research Division, *Final Evaluation of Ward Grievance Procedure at Karl Holton School,* pp. 45-50 (1974).

The Maryland Inmate Grievance Commission excludes inmates and line staff from any significant participation in the Commission's operations. Once a grievant writes to the Executive Director, the latter

unilaterally decides whether a grievance is within the jurisdiction of the procedure or whether the grievance is "frivolous." If the Executive Director decides to attempt to resolve the grievant's complaint informally, the grievant is without recourse, even if he is dissatisfied with the result. Although the grievant whose complaint is scheduled for a hearing has an opportunity to present his case, no other inmate will have a share in the decision-making process. Nor will any staff member who might have some personal knowledge of the inmate, his living unit or the way in which policies are enforced on his living unit. Not surprisingly, the great majority of inmates interviewed by Center staff in different Maryland correctional institutions knew little about the Commission's purpose or mechanics and viewed the procedure simply as an obstacle designed to keep inmates out of court. Keating, *Seen*, at 82-85.

This lack of inmate confidence in the Commission is reinforced by the great unlikelihood that the system will provide a grievant with a favorable response. Available statistics indicate that in its first 31 months of operations, the Commission received 1385 complaints. Administrative dismissals accounted for 752 (54.3%) of submitted complaints; after a hearing before the Commission, only 152 grievances (11%) were found to be meritorious in whole or part. While dismissals can occur for a variety of reasons, including a decision by the inmate that his problem has been resolved satisfactorily, in a typical 90-day period for which such statistics are available, only four (6.3%) of the 63 dismissals were so resolved. During the same period, ten submitted complaints (15.8%) were withdrawn. Brief of Appellant, p. 75, *McCray* v. *Burrell*, 516 F.2d 357 (4th Cir. 1974).

It is important to compare this record with that of an administrative procedure which includes all of the standards suggested by the Center and, in addition, provides for considerable inmate participation. In its first 26 months of operations, the California Youth Authority (CYA) procedure received 3742 complaints.* There are no provisions in the CYA system for dismissals, but some grievances (15.1%) were withdrawn and some were resolved informally, (24.1%). Of all grievances submitted, 2588 (69.2%) were found to be meritorious in whole or in part.

The difference between the two mechanisms is apparent. The California Youth Authority procedure seems to focus on resolving the complaints of inmates promptly and fairly, while the Maryland Inmate Grievance procedure appears to place too much emphasis on establishing a reviewable court record in grievances that might be litigable. The result can be seen in responses to a 1974 questionnaire administered by the Center to a randomly selected ten percent of the inmate populations in Maryland and California institutions. When asked if their complaints were handled promptly, 71.4% of the questioned inmates in the Maryland institution answered, "no"; when asked if their complaints were handled fairly, 64.3% answered, "no." By contrast, only 20.7% of the inmates in one CYA institution answered, "no" to the question about prompt handling of complaints and 10.3% to the question about the system's fairness.

---

* The incarcerated population served by the CYA procedure is approximately 4200 inmates; that of Maryland served by the Commission is approximately 5000.

The Center has contended that the standards discussed in this brief are essential for the creation of an effective and fair—and, therefore, adequate and timely—administrative remedy for inmates' grievances. Since the Maryland Inmate Grievance Commission machinery fails to meet those requirements in important respects, it should not be deemed to justify an exhaustion requirement in this case.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-44

ROBERT BURRELL, *Petitioner,*

—v.—

MILTON McCRAY, *Respondent.*

SERGEANT V. D. SMITH, etc., *Petitioner,*

—v.—

MILTON McCRAY, *Respondent.*

GERALD McCLELLAN, *et al.*, *Petitioners,*

—v.—

JAMES E. X. STOKES, *Respondent.*

DR. HAROLD M. BOSLOW and DR. DOMINGO C. SORONGON, *Petitioners,*

—v.—

JOHN WASHINGTON, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AS *AMICI CURIAE*

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AS AMICI CURIAE

Interest of Amici

The American Civil Liberties Union is a membership organization devoted to the protection and enforcement of individual rights guaranteed by the Constitution of the United States. The National Legal Aid and Defender Association is an organization consisting of attorneys employed by legal aid, legal services, and public defender offices. Many of the clients of member-attorneys are or have been imprisoned or in jail.

Experience has taught amici that the practical efficacy of a constitutional right is no greater than the procedures available to vindicate it. We believe that history and logic point to the same conclusion--that devices which impede access to the judiciary in cases involving constitutional rights inexorably, if unintentionally, result in a de facto weakening of those rights. The imposition of a requirement of exhaustion of state administrative remedies upon prisoners seeking federal judicial redress for alleged violations of federally protected constitutional rights would erect a procedural barrier which would seriously compromise the tenuous strides which have been made to provide minimum constitutional protection to the 250,000 persons currently in American jails. Consents to the filing of this brief have been secured from the parties and have been filed with the Court.

ARGUMENT

Introduction

A requirement of exhaustion of administrative remedies is generally thought to serve several social policies. E.g., Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); McKart v. United States, 395 U.S. 185 (1969). First, it channels decision-making in a given area, at least initially, to an executive forum in the hope that internally generated solutions will be more acceptable to and more vigorously enforced by the administrative officers involved; second, it forces the upper reaches of a bureaucracy to confront the problems prevalent at the operational level; and, third, it permits the infusion of additional administrative expertise prior to judicial resolution of an issue. Moreover, it is often deemed appropriate to require persons who have not yet felt the practical impact of an administrative action to pursue redress in the executive branch, in order to spare the judiciary the burden of confronting an issue prematurely and, perhaps, unnecessarily. Cf., Abbott Laboratories, Inc. v. Gardner, 367 U.S. 362 (1967).

However, a doctrine of exhaustion of administrative remedies as a decision-deferral mechanism carries with it serious social liabilities - especially when deferral is imposed upon persons seeking judicial redress for violations of constitutional rights. First, and most importantly, exhaustion in such a Constitutional context may, and often does,

result in prolongation of constitutionally impermissible conduct; second, it imposes an additional burden of expense on persons seeking access to the courts to vindicate their rights and, third, it promotes a false notion of economy, causing unnecessary duplication of effort, especially in situations where the administrative agency involved lacks genuine expertise in dealing with the legal questions it is called upon to resolve. Finally, a requirement of exhaustion of administrative remedies inevitably raises questions concerning the practical efficacy of the administrative remedy and the likelihood of its acting to insulate unconstitutional activity from expeditious and effective judicial review.

Obviously, reasonable persons may differ as to the appropriate balance which should be struck between the benefits and detriments flowing from the imposition of an exhaustion requirement in various factual contexts. However, in the context of state violations of federally protected constitutional rights, it has been the settled understanding of this Court, as well as the lower federal courts, that Congress, in enacting the Civil Rights Act of 1871 (42 U.S.C. §1983), had struck the balance in favor of expeditious federal judicial redress of state-imposed constitutional violations. Accordingly, this Court has consistently construed 42 U.S.C. §1983 as forbidding a judicially imposed exhaustion requirement - whether of state judicial or state

administrative remedies. E.g. Monroe v. Pape, 365 U.S. 167 (1961); McNeese v. Board of Education, 373 U.S. 668 (1963); Steffel v. Thompson, 415 U.S. 452 (1974). Moreover, the acquiescence of Congress in such a settled construction of 42 U.S.C. §1983 is testimony to Congressional satisfaction with the judiciary's insistence that expeditious redress of Constitutional violations be of primary concern in applying 42 U.S.C. §1983.

It is possible, of course, to secure the benefits of exhaustion without risking its liabilities by the simple expedient of establishing convenient and effective administrative remedies as a voluntary alternative to judicial review. The healthy necessity to compete which such a voluntary administrative remedy must, of necessity, exhibit would increase its effectiveness and insure careful internal review of complaints. However, if such a system were freed from the need to gain the confidence of persons appealing to it, its effectiveness will be impaired at the very time that a complainant is cut off from speedy access to any alternative forum.

Amici do not oppose the creation of voluntary administrative remedies as an alternative to the judicial resolution of §1983 claims. However, if administrative review is, even partially, to supplant judicial review in the constitutional area, it should be as the result of perceived confidence which administrative review has earned, rather than as the result of mandatory controls on a complainant's choice of forum.

Amici suggest, first, that if petitioners wish to disturb the prevailing, settled statutory construction which this Court has given to 42 U.S.C. §1983, their appropriate remedy lies with Congress; for it would be inappropriate for this Court, in effect, to judicially amend 42 U.S.C. §1983 in light of Congress' acquiescence in the settled construction. Alternatively, should this Court deem itself free to re-examine the prevailing construction of 42 U.S.C. §1983, amici urge that the benefits thought to flow from an exhaustion rule are far outweighed by the unacceptable delay which an exhaustion requirement would impose upon persons seeking vindication of their constitutional rights - especially in the factual settings presented by this appeal.

Finally, the mere fact that an exhaustion requirement might relieve docket pressures on the lower Federal courts is no justification for its adoption unless it is desirable without regard to the convenience of the judiciary. Expediency can never be a permissible basis for delaying access to the Courts.

I. IT WOULD BE INAPPROPRIATE TO ALTER THE SETTLED STATUTORY CONSTRUCTION OF 42 U.S.C. §1983 IN LIGHT OF CONGRESSIONAL ACQUIESCENCE IN THE PREVAILING PRACTICE OF NOT REQUIRING EXHAUSTION OF ADMINISTRATIVE REMEDIES UNDER 42 U.S.C. §1983.

As the carefully considered decision of the Court below recognizes, it has been the settled practice of this Court - and of the lower Federal courts - to construe 42 U.S.C. §1983 in accordance with the plain meaning of its words as providing a cause of action for the expeditious redress of a state imposed deprivation of a Federal constitutional right without requiring the exhaustion of state administrative remedies. E.g., McNeese v. Board of Education, 373 U.S. 668, 675 (1963)(declining to require the exhaustion of a state administrative remedy which was merely advisory);[1]

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1 Of course, the administrative remedy at issue herein is also advisory, since the Grievance Commission has power merely to recommend its findings to prison officials. Indeed, the Grievence Commission has even less power than did the "inadequate" administrative body in McNeese, which, at least, had theoretical power to cut off funds to the erring school district. McNeese v. Board of Education, supra at 675-676. Thus, amici respectfully suggest that the instant cases are hardly the proper vehicle to

Damico v. California, 389 U.S. 416 (1967); Houghton v. Shafer, 392 U.S. 639 (1968); King v. Smith, 392 U.S. 309 (1968); Wilwording v. Swenson, 404 U.S. 249 (1971); Preiser v. Rodriquez, 411 U.S. 475 (1973); Steffel v. Thompson, 415 U.S. 452 (1974); see also, Monroe v. Pape, 365 U.S. 167 (1961)(declining to require the exhaustion of an available and effective state judicial remedy). This Court's refusal to permit access to the courts to be burdened by the need to exhaust time-consuming and problematic state remedies (both executive and judicial) is fully consistent with the desire of Congress to create, in 42 U.S.C. §1983, a vehicle for expeditious

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discuss or to rule upon a requirement that a genuinely effective administrative remedy be exhausted. Surely, precatory administrative remedies can never justify the deferral of judicial consideration of colorable allegations of the violation of constitutional rights. Accordingly, amici suggest that serious consideration be given to dismissing certiorari herein as improvidently granted and awaiting the presentation of a case or controversy which actually raises the issue of whether a binding, as opposed to an advisory, administrative remedy must be exhausted. In the absence of such a case or controversy, this Court has deemed itself precluded from addressing itself to hypothetical situations not raised by the parties actually before the Court. E.g., United States v. Raines, 362 U.S. 17 (1960); Broadrick v. Oklahoma, 413 U.S. 601 (1973).

Federal judicial review of state imposed violations of the Federal Constitution. See generally, Monroe v. Pape, supra at 183. It is not necessary, however, to search the legislative history of the 1871 Act for additional clues to Congress' will since Congress, by acquiescing in the vision of §1983 enunciated by the Federal courts, has adopted and ratified the prevailing construction. Thus, any change in the prevailing construction would constitute not only a mis-reading of the intent of Congress in 1871, but also a flouting of the intent of the current Congress. Cf. Chemehuevi Tribe of Indians v. F.P.C., 420 U.S. 395, 411 (1975).

When Congress wishes to burden access to the Courts in this area with an exhaustion requirement it is, of course, quite capable of doing so explicitly. E.g., 28 U.S.C. 2254, (requiring exhaustion before seeking Federal habeas corpus). Given Congress' decision not to burden §1983 with a similar exhaustion requirement, it would be an impermissible exercise of judicial law-making for this Court to legislate in thearea.

II. A REQUIREMENT OF EXHAUSTION OF ADMINISTRATIVE REMEDIES WOULD IMPOSE AN UNACCEPTABLE DELAY UPON PERSONS SEEKING TO VINDICATE CONSTITUTIONAL RIGHTS.

In Monroe v. Pape, supra, this Court ruled that the delay inherent in presenting a claim arising under the Civil Rights Act of 1871 to state courts prior to seeking relief in a Federal court was inconsistent with Congress' intent to provide a readily available "supplemental" Federal forum for the redress of state imposed violations of constitutional rights. If Congress was unwilling to tolerate the delay inherent in presenting Federal constitutional claims to an independent state judiciary bound by the strictures of the Supremacy Clause, it is an a fortiori proposition that Congress was not prepared to tolerate the delay inherent in presenting the identical constitutional claims to a state administrative body, linked closely with the very bureaucrats it purports to review, unencumbered by legal expertise, and incapable of providing binding or effective relief.

A. The Grievence Commission Does Not Provide an Adequate Administrative Remedy.

Petitioners argue that the substantial body of case law relied upon by the Court below stands merely for the obvious proposition that

inadequate state administrative remedies need not be exhausted as a pre-condition to §1983 review. Even if such a crabbed reading of the McNeese-Steffel line of authority is tenable, the serious deficiencies present in the Maryland system renders it "inadequate" as a matter of law.

First, and most importantly, the Grievance Commission is given solely advisory powers. As McNeese explicitly held, an administrative remedy which results merely in a "recommendation" that unconstitutional behavior be terminated can never justify the refusal to entertain an action under 42 U.S.C. §1983. Moreover, the refusal to vest the Commission with power to appoint counsel for indigent complainants in appropriate cases or with power to award compensatory relief reinforces the inadequate status of the Commission as a forum for the effective resolution of Federal constitutional questions. It is inconceivable that an administrative body lacking power to enforce its decisions and lacking the capacity to assure meaningful adversary process can be held to constitute a satisfactory alternative forum within which to consider issues touching the constitutional rights of complainants.

B. No Societal Benefits Would Flow From Channeling Respondents' Complaints Into an Executive Forum.

The question of whether to require exhaustion of administrative remedies may emerge in at least four factual settings.

First, a complainant may seek damages for the past imposition of unconstitutional conditions upon him under a set of rules which are no longer in effect.

Second, a complainant may seek relief from a continuing or imminently threatened violation of constitutional rights under a set of rules which remain in effect.

Third, a complainant may seek damages for past violation of constitutional rights which are not likely to recur under a set of rules which remain in effect.

Fourth a complainant may seek equitable relief from a threatened violation of constitutional rights which does not yet impose a practical detriment on him.[2]

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[2] The factual settings in which an exhaustion issue is likely to arise may be summarized as follows:

(Continued next page)

(footnote continued)

	Status of Alleged Injury	Relief Sought	Status of Administrative Rules Pursuant to Which Challenged Action Was Taken
I.	Past Incident	Damages	No Longer in Effect
II.	Continuing Incident or Past Incident Likely to be Repeated	Injunction or Damages	Remains in Effect
III.	Past Incident Not Likely to be Repeated	Damages	Remains in Effect
IV.	Future Incident	Injunction	Remains in Effect

When a complaint falling within category IV is filed, the social benefits flowing from exhaustion, see, supra, pp 3-4, outweigh any social detriment which may flow from the doctrine. Accordingly, when such fact patterns have emerged, this Court has required exhaustion of administrative remedies as a pre-condition to judicial review. Thus, cases such as McKart v. United States, 395 U.S. 185 (1969) and McGee v. United States, 402 U.S. 479 (1971), represent this Court's recognition that a requirement of exhaustion of administrative remedies is particularly appropriate in situations when a complaining party is not immediately affected by the allegedly improper executive action.[3]

However, whether such cases are perceived as "exhaustion"[4] or "ripeness"[5] decisions, they are readily distinguishable from category I situations in which a complainant seeks damages for past incidents which have taken place under rules which are no longer in effect. When such a complaint is filed, none of the social bene-

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3 As a matter of statutory construction, however, even a category IV case, where the injury is inflicted by state officials, cannot be subjected to a requirement of exhaustion of administrative remedies. See Point I, supra.

4 McKart v. United States, supra.

5 Abbot Laboratories, Inc. v. Gardner, 367 U.S. 497 (1967).

fits thought to accrue from the exhaustion doctrine are present. Accordingly, no serious case may be advanced in such a situation for burdening access to a Federal judicial forum with a socially useless exhaustion requirement. Yet that is precisely the situation revealed by the McCray complaints in this case. The rules pursuant to which McCray was subjected to the inhuman treatment described by the Court below have already been altered by the administrative hierarchy. Only the adjudication of questions of Federal constitutional law and the allocation of individual liability remains. Given the conceded inability of the Commission to award compensatory relief and the fact that the rules under which McCray was confined have already been altered, requiring him to exhaust a meaningless ritual prior to seeking compensatory relief would be absurd.

Category II presents only a slightly different balance than Category I. On the one hand, the rule pursuant to which the challenged action was taken remains in effect. Thus, some social benefit may be said to flow from channeling the initial consideration of its validity into an executive forum. However, the violation of constitutional rights of which the plaintiff complains continues (or is likely to recur) during the pendency of the administrative proceeding, rendering unacceptable the cost of exhaustion - the prolongation of constitutional deprivation. If one must balance the prolongation of unconstitutional conduct against the problematic values of administrative exhaustion, the result clearly favors expeditious access to

the federal courts.[6]

Category III presents the most difficult balance. When a complainant seeks damages for a past incident not likely to recur and the challenged rule remains in effect, administrative exhaustion would appear to provide benefits without imposing serious social detriments. However, such a fact pattern is not before this Court.

Thus, since all four complaints before this Court involve fact patterns under which the detriments flowing from an exhaustion requirement far outweigh any benefits, it would be improper to impose such a requirement upon them.[7]

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[6] The Stokes and Washington complaints fall within Category II, since each alleges the current violation of a constitutional right or a past violation which is imminently likely to recur.

[7] If this Court should impose an exhaustion requirement in this case, it must at the very least recognize that any exhaustion requirement insulates continuing constitutional deprivations from judicial scrutiny during the pendency of the administrative process. Such a danger can be eliminated, however, by exempting applications for interim equitable relief from any exhaustion requirement, while permitting exhaustion to go forward prior to the entry of a final decree. (Continued next page)

CONCLUSION

For the reasons stated above, the decision of the Court below should be affirmed.

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Whenever this Court has imposed a decision-deferral mechanism on persons seeking relief from constitutional violations, it has qualified the mechanism by reiterating the power of a Federal court to issue appropriate interim equitable relief during the pendency of the alternative process. See Harrison v. N.A.A.C.P., 360 U.S. 167, 179 (1959).

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-44

ROBERT BURRELL, *Petitioner,*
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GERALD McCLELLAN, ET AL., *Petitioners,*
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DR. DOMINGO C. SORONGON, *Petitioners,*
v.
JOHN WASHINGTON, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

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IN THE

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OCTOBER TERM, 1975

No. 75-44

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

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OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit in *McCray v. Burrell*, 516 F.2d 357 (4th Cir. 1975) appears in the Appendix to the Petition for Writ of Certiorari at pages 72a through 107a. The Opinion and Judgment of the United States District Court for the District of Maryland in *McCray v. Burrell*, 367 F. Supp. 1191 (D. Md. 1973) appears in the Appendix to the Petition for Writ of Certiorari at pages 1a through 58a. The Opinion and Judgment of the United States District Court for the District of Maryland in *Washington v. Boslow*, 375 F. Supp. 1298 (D. Md. 1974), appears in the Appendix to the Petition for Writ of Certiorari at pages 58a through 69a. The Opinion and Order of the United States District Court for the District of Maryland in *Stokes v. McClellan*, Civil No. 73-1192B, (April 1, 1974) appears in the Appendix to the Petition for Writ of Certiorari at pages 69a through 71a.

JURISDICTION

This Honorable Court has jurisdiction to review this cause by certiorari pursuant to 28 U.S.C. § 1254(1), and has accepted it for such purposes by granting said Writ on November 3, 1975.

CONSENT OF PARTIES

This amici curiae brief is filed by the States enumerated herein pursuant to Rule 42, Supreme Court Rules and consent of the parties is not required pursuant to Rule 42(4).

QUESTION PRESENTED

Whether the United States District Court for the District of Maryland may require exhaustion of adequate State administrative remedies by a prisoner filing an action pursuant to 42 U.S.C. § 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

MARYLAND ANNOTATED CODE

Article 41, Section 204(F):

(a) *Commission established; appointment and terms of members; chairman; vacancies; compensation and expenses.* — The Inmate Grievance Commission is established as a separate agency within the Department of Public Safety and Correctional Services. It shall consist of five members appointed by the Governor with the advice of the Secretary of Public Safety and Correctional Services. Of the five members so appointed, not less than two shall be lawyers qualified to practice law in the State of Maryland and not less than two members shall be persons of knowledge and experience in one or more of the fields under the jurisdiction of the Department of Public Safety and Correctional Services. Of the members initially appointed, two shall be for a term of four years, one shall be for a term of one year. Thereafter, all reappointments shall be for terms of four years. The Governor, with the advice of the Secretary of Public Safety and Correctional Services shall designate the chairman from time to time. The Governor, with the advice of the Secretary of Public Safety and Correctional Services, shall fill any vacancy which occurs before the expiration of a term for the balance of the term so remaining. Each member of the Commission

shall receive per diem compensation as provided in the budget for each day actually engaged in the discharge of his official duties as well as reimbursement for all necessary and proper expenses, in accordance with the standard travel regulations.

(b) *Appointment and salary of executive director; investigative, secretarial and clerical employees.* — The Secretary of Public Safety and Correctional Services, with the advice of the Commission, and with the approval of the Governor, shall appoint an executive director of the Commission who shall serve at the pleasure of the Secretary and who shall receive such salary as provided in the budget. In addition, the Secretary may provide the Commission with such investigative, secretarial and clerical employees as may be necessary for the efficient administration of the powers and duties of the Commission and as provided in the budget.

(c) *Removal of members.* — The Governor, upon the recommendation of the majority of the Commission or upon the recommendation of the Secretary, may remove any member of the Commission for one or more of the following:

(1) Conviction of a crime involving moral turpitude or of any criminal offense the effect of which is to prevent or interfere with the performance of Commission duties.

(2) Failure to regularly attend meetings of the Commission.

(3) Failure to carry out duties assigned by the Commission or its chairman.

(4) Acceptance of another office or the conduct of other business conflicting with or tending to conflict with the performance of Commission duties.

(5) Any other ground which, under law, necessitates or justifies the removal of a State employee.

(d) *Submission of grievance or complaint.* — Any person confined to an institution within the Division of Correction, or otherwise in the custody of the Commissioner of Correction, or confined to the Patuxent Institution, who has any grievance or complaint against any officials or employees of the Division of Correction or the Patuxent Institution, may submit such grievance or complaint to the Inmate Grievance Commission within such time and in such manner as prescribed by regulations promulgated by the Commission. If, and to the extent that, the Division of Correction or the Patuxent Institution has a grievance or complaint procedure applicable to an inmate's particular grievance or complaint, and if the Inmate Grievance Commission deems such procedure reasonable and fair, the Commission may by regulations require that such procedure be exhausted prior to the submission of the grievance or complaint to the Commission.

(e) *Preliminary review.* — When a grievance or complaint is submitted to the Inmate Grievance Committee, the Commission, or any member thereof or the executive director, if so provided by the Commission's regulations, shall preliminarily review the grievance or complaint. If upon such preliminary review the grievance or complaint is determined to be on its face wholly lacking in merit, it may be dismissed, by the reviewing commissioners or commissioner or executive director as the case may be, without a hearing or without specific findings of fact. Such order of dismissal shall be forwarded to the complainant within 60 days after submission of the grievance or complaint and shall constitute the final decision of the Secretary

of Public Safety and Correctional Services for purposes of any judicial review.

(f) *Hearing and disposition by Commission; review by Secretary of Public Safety and Correctional Services.* — Whenever, after the preliminary review provided for in subsection (e), a grievance or complaint is not found to be on its face wholly lacking in merit, the Commission shall as promptly as practicable hold a hearing on the grievance or complaint. At least three members of the Commission shall sit at any hearing, and decisions shall be by a majority of those sitting. A record of the testimony presented at the hearing shall be kept according to the rules and regulations promulgated by the Commission. The Commission's decision shall be issued promptly after the hearing in the form of an order which shall include a statement of the findings of fact, the Commission's conclusions and its disposition of the complaint. The types of disposition shall be as follows:

(1) If after the hearing, the Commission finds in its order that the complaint is wholly lacking in merit and should be dismissed, such an order of dismissal shall be promptly forwarded to the complainant and shall constitute the final decision of the Secretary of Public Safety and Correctional Services for purposes of any judicial review.

(2) However, if after the hearing, the Commission in its order finds that the inmate's complaint was in whole or in part meritorious, such order shall be promptly forwarded to the Secretary of Public Safety and Correctional Services. Within fifteen days of the receipt of such an order, the Secretary by order shall affirm the order of the Commission, or shall reverse or modify the order where he disagrees with the findings and

conclusions of the Commission. The Secretary shall order that the appropriate official of the institution in question accept in whole or in part the recommendation of the Commission or the Secretary may take whatever action he deems appropriate in light of the Commission's findings. The order of the Secretary shall be promptly forwarded to the complainant, and the Secretary's order shall constitute the final decision for purposes of judicial review.

(g) *Access to documentary evidence; subpoenas; oaths and affirmations.* — The Commission, with the approval of the Secretary of Public Safety and Correctional Services, shall at all reasonable times have access to, for the purposes of examination, and the right to copy, any documentary evidence of any person or institution being investigated or proceeded against and may require by subpoena the attendance and testimony of witnesses and the production of all documentary evidence of any person relating to any matter under investigation. The presiding commissioner at a hearing may administer oaths and affirmations.

(h) *Right of inmate to appear before Commission; opportunity to call witnesses; representation by counsel.* — The inmate shall have the right to appear before the Commission and shall have the opportunity to call a witness or a reasonable number of witnesses depending upon the circumstances and the nature of the complaint, subject to the discretion of the Commission as to the relevancy of the testimony and questions and the number of witnesses sought to be called. The inmate shall have a reasonable opportunity to question any witnesses who testify before the Commission. Such rights of the inmate shall not be reasonably withheld or restricted by the Commission. If the inmate requests that he be represented at the hearing by an attorney of

his own choosing he shall be permitted such representation at his own expense.

(i) *Record of complaints.* — A record shall be kept of all complaints and their disposition which shall be open to public inspection during regular business hours.

(j) *Conduct of hearings at certain institutions.* — For the performance of its duties, the Commission may conduct hearings at the institutions under the supervision and control of the Division of Correction or at the Patuxent Institution.

(k) *Rules and regulations.* — The Commission, subject to the approval of the Secretary, shall have the power to adopt rules and regulations for the conduct of its proceeding as provided for in this section.

(l) *Judicial review.* — No court shall be required to entertain an inmate's grievance or complaint within the jurisdiction of the Inmate Grievance Commission unless and until the complainant has exhausted the remedies as provided in this section. Upon the final decision of the Secretary of Public Safety and Correctional Services, the complainant shall be entitled to judicial review thereof. Proceedings for review shall be instituted in the circuit court of the county or in the Baltimore City Court, as the case may be, in which is located the institution where the complainant is confined. Review by the court shall be limited to a review of the record of the proceedings before the Commission and the Secretary's order, if any, pursuant to such proceedings. The court's review shall be limited to a determination of whether there was a violation of any right of the inmate protected by federal or State laws or constitutional requirements.

INTEREST OF THE AMICI

The States enumerated herein submit this Brief since the question presented by Petitioners is equally vital to all of the Amicus States and all other States of the Union. The decision of the United States Court of Appeals for the Fourth Circuit overruled a well-reasoned and forward looking decision of the United States District Court which would have aided all States with adequate inmate grievance procedures in attempting to provide resolution of grievances in their penal institutions.

This case involves the singular question of whether a State, which has enacted adequate inmate grievance procedures for the resolution of grievances by prisoners confined to state institutions, may have the initial responsibility for resolving those grievances by requiring a state prisoner to exhaust those administrative remedies prior to filing a complaint pursuant to 42 U.S.C. § 1983. The United States District Court for the District of Maryland held in its Opinions that such exhaustion would be required based on the finding of the District Court that the Maryland Inmate Grievance Procedure was a valid and adequate remedy for the resolution of grievances. However, the United States Court of Appeals for the Fourth Circuit overruled that decision on the authority of decisions of this Honorable Court in different factual contexts.

This action by the United States Court of Appeals for the Fourth Circuit severely hampers the States from initiating their own reforms and attempting to resolve the problems of prison life. Further, in the interests of federal-state relations, and the conditions of prison life which this Honorable Court indicated should be initially resolved by state officials, Amici herein would

urge that the decision of the United States Court of Appeals for the Fourth Circuit be reversed.

STATEMENT OF THE CASE

The Amici accept and adopt the "Statement of the Case" contained in Petitioners' Brief on the merits.

ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED WHEN IT HELD THAT EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES WAS NOT REQUIRED IN AN ACTION BROUGHT PURSUANT TO 42 U.S.C. § 1983.

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. *But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.* If we would guide by the light of reason, we must let our minds be bold." (Footnote omitted; emphasis supplied) *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), dissenting opinion by Justice Brandeis.

In *Preiser v. Rodriguez*, 411 U.S. 475 (1973) this Honorable Court discussed the intimate and frustrating

relationships which existed between inmates and correctional personnel within penal institutions.

> "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State. Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems." *Preiser, supra*, at 491-92.

Nominally, the above discussion was meant to differentiate the State's interest in resolving habeas corpus cases but, in essence, was more geared to those complaints encompassed by 42 U.S.C. § 1983.

Not only has the State of Maryland instituted an adequate inmate grievance procedure, but Amici herein have either instituted, are in the process of instituting, or are studying the feasibility and desirability of comprehensive inmate grievance procedures for the purpose of resolving prisoner grievances on a state administrative level as an alternative to seeking relief in the federal courts.

Without an exhaustion requirement, experience has clearly dictated that these procedures, for the most part,

will be bypassed in favor of the attractiveness of in-court litigation. While it has been argued that effective administrative procedures will be utilized by inmates, Amici, faced with the reality of the administration of their prison systems, are not so naive as to believe that the majority of inmates will voluntarily use the grievance procedures. Thus far, twenty-three States have instituted grievance procedures and in three States, inmate unions have gained recognition as bargaining agents.[1] These forward looking steps are a

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[1] A. Arkansas has recently established a grievance procedure consisting of three administrative review officers and an appellate procedure within the institution. This procedure is not intended to be a complete alternative to seeking relief pursuant to 42 U.S.C. §1983. However, the Attorney General's Office and the Department of Correction are currently studying the methodology, feasibility, and desirability of establishing a comprehensive grievance procedure as an adequate alternative to and an indispensable prerequisite for an action under 42 U.S.C. § 1983.

B. In California, inmate appeal and review processes are formalized in official regulations. The California Department of Corrections has established systems for administrative appeal of disciplinary actions (BP-4515) and for administrative review of decisions, conditions, and policies affecting inmate welfare (BP-1103). Also established are procedures for administrative review of grievances concerning mail (DP-2412). The California Adult Authority has adopted a multi-level review process for inmate appeals from all board decisions including those on parole and term fixing (Chairman's Directive 75/32). The California Youth Authority has a grievance review procedure of departmental actions (IM 9-22-75) and an appeal system for all decisions and actions of the board (BPM Sec. 36).

C. Connecticut's Ombudsman is selected by private, non-profit agencies and functions independently of the agency that he moniters. ~~Further, an inmate union has gained recognition as a bargaining agent in Connecticut~~.

D. The State of Florida has established an inmate grievance procedure under Inmate Treatment Directive No. 31 (7-1-74) issued pursuant to Florida Statutes, Chapter 944.09. Griev-

result, not only of the realities of the situation, but a feeling on the part of Amici that they should correct

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ances are formerly submitted to the assistant superintendent within 30 days of their occurrence. He then either handles it personally or orders an investigation. Institutional officials have 30 days within which to respond to the inmate. If the grievance is not resolved the inmate may appeal to the Director, who has 30 days to make a response. Records are kept of all grievances, responses and appeals.

E. In Georgia, inmate grievance procedures are authorized by Rule No. 125-1-2-14, State Board of Corrections. The mechanics are outlined in a memorandum from the Commissioner of Corrections to all state institutions dated December 2, 1974. The grievance is first submitted to the Deputy Warden/Superintendent to review and investigate. He may hold a private conference with the inmate to discuss a solution to the problem. Appeal to the Warden/Superintendent is the next step in the process. Then if the inmate is still dissatisfied, he may appeal to the Regional Director within 5 days. The Regional Director has 30 days to respond and route the grievance back to the Deputy Warden/Superintendent for possible conferences. Finally, the inmate may appeal to the Commissioner of Corrections and subsequently to the state courts.

F. Hawaii has a state Ombudsman who is selected by the legislature. The program operates on a state-wide level.

G. An inmate in Idaho may seek review of the decision of the adjustment committee (punitive) or Classification Committee (administrative classification) by the Chief of Habilitation within 3 days. Next, he may appeal to the Warden who has 5 days to respond, and then to the Director of Corrections, who has 10 days to render a decision. Finally, the inmate may appeal to the Board of Correction which will review the case at its next meeting (about 6 times yearly). Idaho's program is administrative with no supporting legislation.

H. Pursuant to Illinois Revised Statutes, Chapter 38, 1003-8-8, the Director of the Illinois Department of Corrections is required to "establish procedures to review grievances of committed persons." Regulation Number 45 of the Administrative Regulations implements the statutory directive. It establishes a system whereby the inmate first files with the personnel in the institution where he is confined. Then the

their own problems as indicated in *Preiser, supra*, and as a further result of the forward looking suggestions of

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matter is reviewed by the Institutional Inquiry Board, which meets weekly and where the inmate may appear. A written report of its findings must be filed within 10 days. These findings are then reviewed by the chief administrator officer of the institution where the grievance arose. That officer has 5 days to render a decision and an appeal lies to the assistant director of the adult division of the Department of Correction and to the Director of the department, who may affirm or refer the matter to the Administrative Review Board. Ultimate findings and recommendations are to be embodied in reports filed with the director and the assistant director, subject to their final determination.

I. In Iowa, the Ombudsman is an investigator for the Citizens' Aid and is selected by the Legislature. Like Connecticut's Ombudsman, Iowa's version contemplates that the Ombudsman will function independently of the agency under investigation.

J. Louisiana has a purely voluntary grievance procedure not established by statute.

K. In Massachusetts, the state has recognized inmate unions and negotiates with them.

L. Michigan has also recognized an inmate union and negotiates with it.

M. Minnesota also has an Ombudsman for corrections and a staff inmate counsel at the State prison. The office of Ombudsman was created by Minnesota Statutes, Section 241.41 (1974) Laws of Minnesota, 1973, Chapter 553, §5. He has the power to investigate complaints, order persons to appear, give testimony and produce documents, and bring actions in the appropriate state court. He may receive complaints about actions of any administrative agency or on his own motion, initiate and investigate such action. After investigation, he makes recommendations to the agency. His conclusions and suggestions may be published by transmitting them to the Office of the Governor.

N. Missouri's Inmate Grievance procedures are outlined in a memorandum from the Department of Corrections to all State institutions dated June 28, 1974, Bulletin No. 55. An inmate is given 30 days to file his complaint with the director of the division, who will refer it to the director of program services or support services, who then has 15 days to

Chief Justice Burger and the recognition of reality as indicated by Justice Powell in *Procunier v. Martinez*,

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investigate the case and prepare a report. If it is not resolved there, the matter is referred to the director, who may appoint a panel of three to consider the problem. One of the members of the panel must be a citizen outside the Division of Corrections agreeable to both the inmate and the Division. If an inmate is still dissatisfied, the matter is submitted within three days to the director. If not referred to a panel at the outset, the director has 30 days to render a decision.

O. Nebraska has instituted an administrative grievance procedure to resolve inmate grievances at their correctional facilities.

P. The New Hampshire State Prison in Concord, New Hampshire, has had in effect since May, 1973 an Inmate Grievance Procedure. Annually, the members of the general prison population elect approximately 18 "shop representatives." They, in turn, appoint 5 spokesmen who meet with the warden on a bi-weekly basis and, when necessary, with the deputy warden or chief custodial officer. The meeting agenda encompasses a full range of topics; of central concern is the presentation, discussion and attempted resolution of inmate grievances.

Q. New Jersey, while without enabling legislation for an inmate grievance procedure, does have an Ombudsman who examines complaints of state prison inmates.

R. In New Mexico, an inmate must submit his grievance to grievance officers who then refer the same to case workers. A case worker has 5 days to respond and the inmate may appeal to a 3 member grievance committee which has 10 days in which to act. Finally, he applies to the corrections commission which must act at its next regularly scheduled meeting, provided the grievance is submitted at least 5 days prior thereto. Records of findings and actions taken are kept at each level.

S. New York has recently established a comprehensive inmate grievance procedure pursuant to chapters 865, 866, and 867 of McKinney's 1975 Session Laws of New York. Guidelines for the inmate grievance procedures are currently being drafted and a program should be operational by February 5, 1976.

T. Under Article 11, General Statutes of North Carolina, §§ 148-101-113, North Carolina has established a 5 member

___ U.S. ___, 94 S. Ct. 1800, 1807, Fn. 9 (1974). *See also, Report On The Federal Judicial Branch — 1973*, 59 A.B.A.J. 1125.

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inmate grievance commission, which conducts hearings on those complaints found to be meritorious. The Statute also provides for a review of the commission's decisions by the Secretary of Correction and eventually by the State courts. At the hearings, the inmate has the right to be present, cross examine witnesses, and be represented by an employee of the Department of Correction.

U. Ohio has a state-wide Ombudsman Program.

V. Oregon has an Ombudsman Program similar to that of Hawaii, but the Ombudsman in Oregon is appointed by the Governor.

W. Rhode Island has recognized an inmate union and negotiates with it.

X. South Carolina has a state-wide Ombudsman Program.

Y. By a Directive effective July 14, 1975, the Director of the Texas Department of Corrections has instituted an administrative grievance procedure. If a formal resolution of a complaint between an inmate and staff cannot be made, the inmate files a formal written complaint to the unit warden within thirty days from the date on which the events which form the basis of the complaint occurred. The unit warden must respond within 15 days from the receipt of the complaint in writing, and sooner, if the same is of an emergency nature. If the inmate is dissatisfied with the unit warden's response, an appeal lies to the Director of the Texas Department of Corrections within thirty days from the receipt of the warden's response. The Director then has 30 days within which to reply to the inmate. Provisions are made for a written record.

Z. Virginia's inmate grievance procedure was implemented in September, 1973 (revised November, 1974), by the Department of Correction for its own use. A prisoner first files his grievance with the officer in charge of the institution. After an investigation and hearing, if necessary, the superintendent has 8 days to respond to the inmate. An appeal then lies to the deputy director of corrections who has 15 days to reach a decision. A hearing or investigation may

A. THE DOCTRINE THAT EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES BY A STATE PRISONER IS NOT REQUIRED IS INAPPLICABLE WHERE THERE ARE IN EXISTENCE ADEQUATE STATE ADMINISTRATIVE REMEDIES.

In *McCray v. Burrell*, 367 F. Supp. 1191 (D. Md. 1973), the United States District Court for the District of Maryland found that the remedy provided by the Maryland Inmate Grievance Commission, established pursuant to Article 41, Section 204F, Maryland Annotated Code was an adequate remedy and that a state prisoner must exhaust those administrative remedies prior to filing an action pursuant to 42 U.S.C. § 1983. *McCray, supra*, 367 F. Supp. 1208, 1210; *see also Hyde v. Fitzberger*, 365 F. Supp. 1021 (D. Md. 1973) and *Washington v. Boslow*, 375 F. Supp. 1298 (D. Md. 1974). Although the majority opinion did not reach the adequacy of the administrative remedy in *McCray v. Burrell*, 516 F.2d 357 (4th Cir. 1975), Circuit Judge Widener, in his separate opinion, stated that that Court had not yet been faced with a factual situation similar to that presented, that is, an adequate administrative remedy. *McCray, supra*, 516 F.2d at 377.

In *Hayes v. Secretary*, 455 F.2d 798 (4th Cir. 1972), the Fourth Circuit, when faced with the exhaustion question in a civil rights action based on Maryland's Inmate Grievance Commission, stated that the time was not yet ripe to discuss exhaustion, as the Inmate Grievance Commission was not fully operative at the

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be conducted if necessary. The decision of the deputy director is final.

AA. In Wisconsin, inmates may refer their complaints to the warden who may convene the staff inmate commission to consider the complaints and make recommendations. There is also an assistant attorney general who functions as a specially appointed investigator who reviews the complaints.

time of that case. 455 F.2d at 800. While overruling the District Court in this case, the Fourth Circuit recognized the factors identified by the District Court in *McCray* and *Washington* when the District Court required exhaustion, but was ". . . constrained to conclude that the holding that exhaustion is required may be reached only by either legislation conditioning resort to 42 U.S.C. § 1983 upon the exhaustion of available administrative remedies, or by the Supreme Court's re-examination and modification of controlling adjudications on the subject." *McCray, supra*, 516 F.2d at 360. Interpreting prior decisions of this Honorable Court to hold that exhaustion could never be required without a re-evaluation of policy, the majority of the Fourth Circuit declined to impose that requirement on state prisoners filing under 42 U.S.C. § 1983 in Maryland.

The policy considerations previously discussed and the major cases which followed *Monroe v. Pape*, 365 U.S. 167 (1961), require that the presumptive conclusion of the Fourth Circuit in this case, that exhaustion may not be required, should be re-examined and modified.

In *Monroe, supra*, this Honorable Court indicated that the primary purposes of 42 U.S.C. § 1983 were to over-ride certain state laws; provide a remedy where state laws were inadequate; and to provide a federal remedy where an illusory state remedy was in existence. *Monroe, supra*, at 173-174. In that Opinion, however, it was stated that the federal remedy was supplementary to the state remedy and that a complainant need not first seek and use the state remedy. *Monroe, supra*, at 183. Literally interpreted, that would seem to have put an end to the controversy, but if the word supplementary was used in its common meaning,

then it would have rendered superfluous the second and third statutory purposes discussed in *Monroe*. *See Egner v. Texas City Independent School District*, 338 F. Supp. 931, 935-36, (S.D. Tex. 1972). Further, the remedies dealt with in *Monroe* were State judicial as opposed to administrative remedies.

McNesse v. Board of Education, 373 U.S. 668 (1963) and *Houghton v. Shafer*, 392 U.S. 639 (1968) (per curiam), involved situations with inadequate state remedies. *Damico v. California*, 389 U.S. 416 (1967) (per curiam), relied on *Monroe, supra*, and *McNesse, supra*, and did not discuss the adequacy of the State administrative remedy. In *Wilwording v. Swenson*, 404 U.S. 249 (1971) (per curiam), this Honorable Court, in discussing 42 U.S.C. § 1983, inserted the usual reference to the probable futility of those remedies although the remedies in that case appeared to have been state judicial remedies. *Wilwording, supra*, at 250-252.

But these five landmark cases were not without their detractors. In *Monroe, supra*, Justice Frankfurter dissented and concluded that § 1983 was meant to cover only those situations where a state agent acted pursuant to some state law, custom or usage. As Illinois had held such intrusions that occurred in *Monroe* to be illegal, the jurisdictional requisite was not met. ". . . [O]nly in instances of injury for which redress was barred in the state courts because some 'statute, ordinance, regulation, custom, or usage' sanctioned the grievance complained of . . ." would exhaustion not be required. *Monroe, supra*, at 237; *see also* pp. 255 and 258. Similarly, Justice Harlan indicated in *McNesse, supra*, at 678, that where state procedure provided sanctions, exhaustion should be required. Further, in *Damico, supra*, Justice Harlan again dissented and stated that the word "supplementary" as used in

Monroe, supra, was now interpreted to mean that an individual would not be required to exhaust his adequate state administrative remedies. "If this is what the majority opinion in *McNesse* meant to say, its dictim was gratuitous both in the sense that it was not compelled by the facts as the Court viewed them and in the sense that it was an incorrect interpretation of *Monroe*." *Damico, supra*, at 418. In *Wilwording, supra*, Chief Justice Burger disagreed with the summary reversal in that case and stated that the Court assumed ". . . without citation of authority that further resort to state remedies would be futile . . ." *Wilwording, supra*, at 253.

B. THE DOCTRINE OF NON-EXHAUSTION, WHILE PRESUMPTIVELY APPLYING TO ALL ACTIONS BROUGHT PURSUANT TO 42 U.S.C. § 1983, HAS BEEN ERODED AND PUBLIC POLICY REQUIRES THAT AN EXCEPTION BE MADE UNDER THE CIRCUMSTANCES OF THIS CASE.

Subsequent to *Wilwording, supra*, it was thought that the question was settled that exhaustion in § 1983 cases would not be required. In *Gibson v. Berryhill*, 411 U.S. 564 (1973), this Honorable Court indicated that in certain instances exhaustion of state administrative remedies would be required. This Honorable Court found, however, in that case, that the state administrative remedies were so defective that the plaintiffs were denied due process of law. *Procunier v. Martinez, supra*, while leaving the question of exhaustion under § 1983 unresolved, did indicate that conditions of confinement in penal institutions were not readily ". . . susceptible of resolution by decree . . ." and that the courts were ill equipped to deal with these problems. *Procunier, supra*, ___ U.S. ___, 94 S. Ct. at 1807. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), this Honorable Court did formulate

a distinction between the due process rights of those incarcerated and those possessed by citizens in free society. *Wolff, supra*, 418 U.S. ____, 95 S. Ct. at 2977. *See also* the separate opinion of Judge Widener in *McCray, supra*, 516 F.2d at 376. Interpreting *Huffman v. Pursue*, ___ U.S. ___, 95 S. Ct. 1200 (1975), Judge Widener indicated that the ". . . all embracing rule of non-exhaustion in all § 1983 cases is no longer the law, for this, and the holding in *Wolff*, are direct holdings that, first, prisoners' rights are special cases, and second, exhaustion may be required in some circumstances although the basis of the suit is under 42 U.S.C. § 1983." *McCray, supra*, 516 F.2d at 376 (Separate opinion of Judge Widener).

Further erosion of the non-exhaustion doctrine is found in the line of cases which have held that exhaustion of state administrative remedies might be required in certain instances. In *Toney v. Reagan*, 467 F.2d 953 (9th Cir. 1972), probationary teachers were required to exhaust their state administrative remedies when the damage was prospective. *Toney, supra*, at 957. See also *Whitner v. Davis*, 410 F.2d 24 (9th Cir. 1969); *Acanfora v. Board of Education*, 491 F.2d 498 (4th Cir. 1974) and *Mondell v. Mayor and City Council*, 356 F. Supp. 76 (D. Md. 1973). Similarly, in *Pope v. State Bar of Texas*, 480 F.2d 998, 1003 (5th Cir. 1973) the United States Court of Appeals for the Fifth Circuit required exhaustion when there were adequate state administrative remedies in order to assure that § 1983 actions were ripe for adjudication. *See also Raper v. Lucey*, 488 F.2d 748 (1st Cir. 1973).

Finally, the cases which require exhaustion of federal administrative remedies prior to filing action in federal court on civil rights type complaints provide additional support for exhaustion of state administrative remedies.

See McGaw v. Farrow, 472 F.2d 952 (4th Cir. 1973); *Kochie v. Norton*, 343 F. Supp. 956 (D. Conn. 1972); and *McCray, supra*, 367 F. Supp. 1200-01.

While Amici are aware of the long series of cases which have held that exhaustion is not required in a § 1983 action, they clearly agree with the summation by Judge Newman in *Kochie, supra*, when he stated that:

> "No decision of the Supreme Court squarely holds that the complaint of a state prisoner, which, if well-founded, is capable of prompt and complete redress by an administrative official, can be brought directly into a federal district court under § 1983 without any attempt at exhaustion of administrative remedies. I am reluctant to believe the law is otherwise, at least until dismissal for failure to exhaust that type of administrative remedy is held to be improper." *Kochie, supra*, at 960.

Similarly, Judge Northrop concluded that:

> "Therefore, this Court concludes that before it will exercise jurisdiction over a prisoner § 1983 complaint, the inmate must exhaust the available state administrative remedy provided by the Maryland Inmate Grievance Commission procedure. Even if the complaint seeks only monetary damages, this avenue of relief should be exhausted. The claim for monetary damages is inextricably tied to prison regulations and disciplinary procedures. The Maryland Inmate Grievance Commission provides a forum with built-in judicial review which can more expertly sort out the meritorious from the frivolous.
>
> "Such a disposition by initial action in the federal courts is not attainable except by tortuous process, as demonstrated by these cases as well as the vast majority of other § 1983 prisoner petitions. Nor does it frustrate the original intendment of § 1983, for having taken this route the complaining

> prisoner can come to this Court with the issue of liability clearly defined on the record. Thus, the federal court can readily dispose of the litigation in the same manner in which it now handles habeas corpus petitions." *McCray, supra,* at 1210.

In *Monroe, supra,* Justice Frankfurter, in his dissenting opinion, discussed the purpose and application of 42 U.S.C. § 1983 and distinguished it from other areas of the law where stability of decision is necessary. He equated the issue raised by litigation under § 1983 as a problem which concerned directly the system of American federalism and while recognizing that *stare decisis* was important, concluded that it was "'. . . a principle of policy and not a mechanical formula of adherance to the latest decision, however recent and questionable. . . .'" *Monroe, supra,* at 222.

In light of changed circumstances, public policy demands the re-examination of the principle that prisoner petitions under 42 U.S.C. § 1983 are not subject to exhaustion of adequate state administrative remedies. When the States have taken upon themselves the burden of resolving their own problems and have equipped themselves with the means necessary to do so, they should have the initial right to determine whether a problem exists, and if it exists, the responsibility for correcting it.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request that the decision of the United States Court of Appeals for the Fourth Circuit in this case be reversed and the decision of the United States District Court for the District of Maryland be affirmed.

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